(26)

No. 95-897-CFX Title: Francis Bernard Auer, et al., Petitioners
v.
David A. Robbins, et al.

Docketed: December 8, 1995 Court: United States Court of Appeals for the Eighth Circuit

Entry	Date	Proceedings and Orders
	Dec 7 1995	Petition for writ of certiorari filed. (Response due January 7, 1996)
	Dec 7 1995	Appendix of petitioner filed.
	Jan 5 1996	Brief of respondents David A. Robbins, et al. in opposition filed.
	Jan 17 1996	DISTRIBUTED. February 16, 1996
	Feb 20 1996	The Solicitor General is invited to file a brief in this case expressing the views of the United States.
	May 31 1996	Brief amicus curiae of United States filed.
	Jun 5 1996	REDISTRIBUTED. June 21, 1996
	Jun 24 1996	Petition GRANTED. SET FOR ARGUMENT December 10, 1996. **********
	Jul 24 1996	Order extending time to file brief of petitioner on the merits until August 22, 1996.
	Aug 20 1996	Record filed.
	Aug 21 1996	Order further extending time to file brief of petitioner on the merits until August 29, 1996.
	Aug 22 1996	Record filed.
	Aug 27 1996	Brief amici curiae of International Union of Police Associations, et al. filed.
	Aug 27 1996	Brief amicus curiae of National Association of Police Organizations, Inc. filed.
	Aug 28 1996	Brief of petitioners Francis Bernard Auer, et al. filed.
	Aug 28 1996	Joint appendix filed.
	Aug 29 1996	Brief amicus curiae of AFL-CIO filed.
	Aug 29 1996	Brief amicus curiae of National Employment Law Project, Inc. filed.
	Aug 29 1996	Brief amicus curiae of Non-Union Employees in the Private & Public Sectors filed.
	Sep 10 1996	Motion of International Association of Chiefs of Police for leave to file a brief as amicus curiae filed.
	Sep 20 1996	Order extending time to file brief of respondent on the merits until October 11, 1996.
	Sep 23 1996	Opposition of petitioners to motion of International Association of Chiefs of Police for leave to file a brief as amicus curiae filed.
	Oct 10 1996	Brief amicus curiae of Labor Policy Association filed.
	Oct 10 1996	Brief amicus curiae of New York City Transit Authority filed.
	Oct 11 1996	Brief of respondents David A. Robbins, et al. filed.
	Oct 11 1996	Brief amicus curiae of Department of Water and Power of the City of Los Angeles filed.
	Oct 11 1996	Brief amici curiae of Chamber of Commerce of the United States of America, et al. filed.
	Oct 11 1996	Brief amici curiae of Wisconsin, et al. filed.

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No. 95-897-CFX

Entry	Date	Proceedings and Orders
	Oct 11 1996	Brief amicus curiae of Broward County, Florida filed.
	Oct 11 1996	Motion of National League of Cities, et al. for leave to file a brief as amici curiae filed.
	Oct 11 1996	Motion of League of California Cities, et al. for leave to file a brief as amici curiae filed.
	Oct 11 1996	Brief amicus curiae of City of New York filed.
	Oct 11 1996	Brief amicus curiae of United States filed.
	Oct 15 1996	Motion of International Association of Chiefs of Police for leave to file a brief as amicus curiae GRANTED.
	Oct 18 1996	Opposition of petitioners to motion of National League of Cities and other amici for leave to file a brief as amici curiae filed.
	Oct 21 1996	Motion of National League of Cities, et al. for leave to file a brief as amici curiae GRANTED.
	Oct 28 1996	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
	Nov 8 1996	CIRCULATED.
	Nov 12 1996	Motion of League of California Cities, et al. for leave to file a brief as amici curiae GRANTED.
	Nov 12 1996	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
	Nov 12 1996	Reply brief of petitioners Francis Bernard Auer, et al. filed.
	Dec 10 1996	ARGUED.

Supreme Court, U.S.
FILED

(1) 95-897 DEC 7 1995

No. OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

FRANCIS BERNARD AUER, *et al.*,
Petitioners,

v.

DAVID A. ROBBINS, *et al.*,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq.*, ("FLSA") salary basis test of "white collar" FLSA exemptions apply to public employees?

2. Do the United States Department of Labor ("DOL") FLSA salary basis regulations in 29 C.F.R. §§ 541.5d and 541.118(a)(5), which require the loss of exempt status when an employee is "subject to" nonsafety disciplinary suspension of less than a pay period apply only in cases of actual suspension or does DOL's interpretation that a personnel rule subjecting employees to discipline alone result in loss of exempt status control the application of the rule?

3. Do the DOL's "window of correction" rules in 29 C.F.R. § 541.118(a)(6) allow an employer to treat a group of employees, police sergeants and lieutenants in this case, as exempt simply by revoking, a small portion of an offending disciplinary rule, which it had actually applied after the initiation of the litigation, to a member of the employee group, without revoking the more general "subject to discipline" rule and without actually restoring the lost compensation to the employee involved?

PARTIES TO THE PROCEEDING BELOW

The Plaintiffs in the District Court include Francis Auer, Christopher Day and James Hill, all sergeants in the St. Louis Police Department, and 286 additional similarly situated Plaintiffs, including one lieutenant, Manuel Delgado, who are listed in the footnote which follows.* All of the Plaintiffs were Appellants/Cross

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* Francis Bernard Auer; Christopher James Day; James Gilbert Hall; Francis B. Corona; Anthony Pona; Michael T. Indelicato; Richard Buehler; James E. Long; Roy Burgdorf; Donald Swanson; Lionel Abernathy; Kenneth Ackerman; Alfred Adkins; Duane Alexander; Steve W. Alsup; Roger Amelung; James Anderson; Michael Anderson; Edward L. Atherton; Roosevelt Barnes, Jr.; Vernon Barton; Richard C. Bartram; Lee Bates; Darrel Battle; Robert W. Bayless; Michael Beck; Dennis Becker; Joseph D. Beffa; Chris Beffa; Michael Bergman; John Billings; Michael Blanks; Leonard Bober; Donald L. Bohnert; Robert L. Bonzon; Frank Booker; Fred Boyd; Kenneth M. Bradshaw; Robert Brennan; Joseph Burgoon; John M. Burke; Thomas Burke; Jay Burkhard; Shadrach J. Burks; Al Carter; Michael Caruso; Salvatore Chrum; Earl Cobb; Walter Collier; Donald Columbo; Clarence Contestabile; Phillip P. Cornish; Don Cumings; Stanley Cunningham; Gordon Curd; Thomas J. Daley; Jerome Dampier; Robert Davis; Steve Debisschop; Robert Decker; Manuel Delgado; Edward S. Dickerson; Leman Dobbins; Jerry Dodson; James M. Doggendorf; Stephen Dougherty; Robert Downey; Robert J. Duffin; Daniel Duffy; Judith Dupius; Jimmie Lee Eads; Donald Ebner; Thomas Eckhard; Carl Edwards; Robert E. Farrell; Lawrence Flowers; Jackie Fowler; Leonard G. Forsting; Lynn D. Fox; Tommy Franklin; Michael Frederick; Nick Frederickson; Donald M. Frentzel; Bob Gavin; Robert George; Raymond L. Ghrist; Wilkie Glasener; James Glasscock; Thomas Godfrey; William Gooden; Joel Grant; Edward V. Graves; Darla Gray; Jesse Green; John D. Green; Robert C. Griffin, III; Ward Griggs; Wilburn Grove; Mike Guzy; Dennis Hahn; Kenneth Hahn; Arthur Hammer; Adolphus Hardy, Jr.; Donald Hardy; Steve Harmon; Ralph Harper; Edward Harper; Peggy Harris; Reggie Harris; Henry G. Harris; Gregory Hawkins; Mark Helmholt; Donald Henderson; Ronald Henderson; Leo Hertling; Stephen Hobbs; Susan Hobbs; Joseph Hoeing; Andrew Hollins; Jack W. Huelsmann; Jack Huesgen; Lloyd Huggans; Riley L. Hughes, Jr.; Edmund Ronald Jablonski; Michael Jarvis; Roy Joachimstaler; Cletus Johnson; Joe

Appellees before the United States Court of Appeals for the Eighth Circuit. The Defendants and Appellees/Cross Appellants included David Robbins, Member of the St.

W. Johnson; John Johnson; Michael Jones; Milton Jones; Richard Jones; Robert W. Jones; Rochelle Jones; Terry Kaelin; David E. Kassebaum; John Kavadas; Elmer Kavanaugh; Kenneth Kegel; Guinn Kelly; Genevieve Kelly; David Keough; Ronald R. Klein; Ronald Klier; Robert Klinger; Jerome Klipfel; Howard Klocke; Rodger G. Kohler; Gus Kolilis; Jeffrey Kowalski; Judith A. Kramer; Joseph Kriska; Robert Kruger; John P. Kuelker; Gary Kukla; Edward Kuntz; William Kusmec; Norman Land; William Landrum; Michael L. Lauer; Thomas Leassner; Frank Lebeau; Audrey L. Lee; Leo Lewis; Joseph Lievin, Jr.; Larry Dean Liggett; J.W. Loftin; Jim E. Long; Jim H. Long; Edward Longinetti; Donna Love; Dave Lowell; Michael Lowry; Edward Lynch; Anthonette Madison; Edward Magee; Thomas J. Magnan; Warren Malugen; Joseph Marcinkiewicz, Jr.; Charles Marvin; Philip F. Maugeri; Clyde McCandless; Michael McCraw; William McCuller; Joseph McCulloch; Joe McDermott; Tim McDonough; George McDonough Timothy McEntee; John McKenzie; Edward Messmer; Charles Metzner; Stanley Mierzejewski; Eugene Milne; Preston Moore; Richard Moore; James Moran; John J. Moriarty; Pat Morici; Bert Morris; Marlin Mueller; Gerard D. Murphy; Timothy Murphy; Joseph Murphy; Francis J. Meyers; Albert Napier; Paul Neudecker; Worthy Newsom; Daniel Nichols; John R. Nieman; Tom Niemeyer; Beverly Noble-Barnes; Leroy Nunally; Lawrence O'Toole; Dennis Oberdieck; Steve Olish; Ron Owensby; John Page; Manson Parks; Robert Piekutowski; John P. Podolak; Gary Poelling; Dennis Pollihan; William Priest; Joseph Priest; Billy Qualls; Dan Rechtien; Abraham Reddick; Joe Reynolds; Anthony Rice; Jack Eugene Richards; Larry Richards; Jacob D. Richardson; Herbert L. Riley; James Riordan; Simon J. Risk; Louis Rizzuti; Joseph Robinson; Michael T. Roe; Thomas L. Roth; John Roussin; Arthur Ruehl, Anthony Russo; Daniel Saltz; John Salamone; Thomas L. Saliba; Ronald Sanneman; Dana Saunders; John L. Saylor, Jr.; Charles Schaeffer; Robert Scheetz, Jr.; Jon S. Schickedanz; Gary A. Schubert; Timm Seithel; Raymond Sheehan; Michael Siemers; Samuel J. Simon; Daniel G. Simpher; Richard Simpher; Joseph B. Sims; Terrance Sloan; Russell F. Smith; Eugene Smith; Gwen Spicer; Charles Steele, Vincent R. Stehlin; Paul E. Steinart; William Stevenson, Jr.; Daniel C. Stewart; Paul Stewart; James J. Stika; Donald Storie; Richard Suzy; William G. Swiderski; Gregory Tayborn; John Taylor;

Louis Board of Police Commissioners and its acting President and the other members of that Board—Rita M. Kropf, James F. Conway, Charles Mischeaux, and Freeman Bosley, or their predecessors on the St. Louis Board of Police Commissioners.

Fred Turner; Herman Ubben; George Venegoni; Michael Vierling; Donald Volmert; James Walker; James Walsh; John Walsh; Joseph E. Walsh; Russell Whitener; Dwight D. Wideman; Michael Williams; Rodney Williams; Warren Williams; John G. Wondracheck; James Wurm; Robert Zambo, Jr.; Thomas E. Zipf.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING BELOW	ii
TABLE OF AUTHORITIES	vii
OPINIONS BELOW	1
JURISDICTIONAL STATEMENT	2
STATUTES AND REGULATIONS	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE PETITION	10
I. A SEVERE AND CONFUSED CONFLICT EXISTS AMONG THE COURTS OF APPEALS AS TO THE APPLICATION OF THE FLSA SALARY BASIS TEST, ITS DISCIPLINARY DOCKING RULE, AND THE WINDOW OF CORRECTION	10
1. Circuit Courts of Appeals' Recognition of Conflicts in Circuits	10
2. Table A: "FLSA Salary Test Conflicts in Circuits"	12
II. THE DECISION BELOW CONTAINS AN ERRONEOUS INTERPRETATION OF AN IMPORTANT QUESTION OF FEDERAL LAW RELATING TO THE FLSA SALARY BASIS TEST, ITS DISCIPLINARY DOCKING RULE, AND THE FLSA WINDOW OF CORRECTION	13
1. Disciplinary Docking: "Subject To" vs. Actual	13

TABLE OF CONTENTS—Continued

	Page
2. Window of Correction: "Inadvertent" or "For Reasons Other Than Lack of Work"—Conjunctive or Disjunctive	15
3. Deference to the DOL	16
CONCLUSION	18
EXHIBIT	1e
APPENDIX	Separately Bound

TABLE OF AUTHORITIES

CASES	Page
Aaron v. City of Wichita, 54 F.3d 662 (10th Cir. 1995)	11, 13, Ex
Abshire v. County of Kern, 908 F.2d 483 (9th Cir. 1990), *cert. denied*, 498 U.S. 1068 (1991)	10, Ex
Allen v. County of Fairfax, 127 Labor Cas. Para. 33, 649 (4th Cir. 1994)	Ex
Arnold v. Ben Kewosky, Inc., 361 U.S. 388 (1960)	9
Atlantic Firefighters v. City of Atlanta, 920 F.2d 800 (11th Cir. 1991)	10, 13, Ex
Auer v. Robbins, 65 F.3d 702 (8th Cir. 1995)	*passim*
Avery v. Talladego, 24 F.3d 1337 (11th Cir. 1994)	Ex
Bankston v. Illinois, 60 F.3d 1249 (7th Cir. 1995)	Ex
Barner v. Navato, 17 F.3d 392 (9th Cir. 1994)	Ex
Bennett v. Albuquerque, 1995 U.S. App. LEXIS 8901 (10th Cir. April 18, 1995)	Ex
Brock v. Claridge Hotel and Casino, 846 F.2d 180 (3d Cir. 1987), *cert. denied*, 488 U.S. 925 (1988)	10
Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837 (1983)	2, 7, 16
Corning Glass Works v. Brennan, 417 U.S. 188 (1974)	9
D'Camera v. District of Columbia, 693 F. Supp. 1208 (D.D.C. 1988)	10
District of Columbia Nurses' Ass'n v. District of Columbia, 1988 U.S. Dist. LEXIS 16500 (D.D.C. 1988)	10
Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985)	8
Harris v. District of Columbia, 709 F. Supp. 238 (D.D.C. 1989)	10
Hartman v. Arlington County, 720 F. Supp. 1227 (E.D. Va. 1989), *aff'd*, 903 F.2d 290 (4th Cir. 1990)	11, Ex
Hilbert v. District of Columbia, 23 F.3d 429 (D.C. Cir. 1994)	Ex
Hurley v. Oregon, 27 F.3d 392 (9th Cir. 1994)	Ex
IAFF v. Alexandria, 720 F. Supp. 1230 (E.D. Va.), *aff'd*, 912 F.2d 463 (4th Cir. 1989)	Ex

TABLE OF AUTHORITIES—Continued

Page

Kinney v. District of Columbia, 994 F.2d 6 (D.C. Cir. 1993) ..... 10, 11, 13, Ex
Klein v. Rush-Presbyterian-St. Luke's Medical Center, 990 F.2d 279 (7th Cir. 1993) ..... 13, 16, Ex
Lee v. Flightsafety, 20 F.3d 428 (11th Cir. 1994) .. Ex
Martin v. Malcolm Pirnie, Inc., 949 F.2d 611 (2d Cir. 1991), *cert. denied*, 113 S. Ct. 198 (1992) .... 16, Ex
Martin v. Monks, 1993 U.S. App. LEXIS 20610 (6th Cir. 1993) ..... 13, Ex
McDonnell v. Omaha, 999 F.2d 293 (8th Cir. 1993), *cert. denied*, 114 S. Ct. 1188 (1994) ..... 6, 11, Ex
Mitchell v. Kentucky Finance Co., 359 U.S. 290 (1959) 9
Mueller v. Reich, 54 F.3d 438 (7th Cir. 1995), *cert. pending*, No. 95-586 (1995) ..... 9, 11, Ex
Michigan Ass'n of Government Employees v. Michigan Dep't of Corrections, 992 F.2d 82 (6th Cir. 1993) ..... 10, 13, 14, Ex
Michigan Supervisors' Office & Professional Employees Inter'l Union v. Michigan Department of Corrections, 1995 U.S. App. LEXIS 19956 (6th Cir. July 13, 1995), *cert. pending*, Case No. 96-688 (1995) ..... 9, Ex
NLRB v. Aerospace Co. Div. of Texton, 416 U.S. 267 (1974) 8
Powell v. United States Cartridge Co., 399 U.S. 497 (1950) 9
Reich v. Pierce, 1994 U.S. App. LEXIS 36194 (6th Cir. 1994) ..... Ex
Shockley v. Newport News, 997 F.2d 236 (4th Cir. 1991) ..... 13, Ex
Service Employees International Union, Local 102 v. County of San Diego, 35 F.3d 483 (9th Cir. 1994), *en banc, denied, supp. op.* 60 F.3d 1346 (9th Cir. 1995), *cert. pending*, Case No. 95-724 (1995) ..... 9, 12, Ex
Whitmore v. Port Authority, 907 F.2d 20 (2d Cir. 1990) ..... Ex

TABLE OF AUTHORITIES—Continued

Page

York v. Wichita Falls, 994 F.2d 236 (5th Cir. 1991) ..... 13, Ex

STATUTES AND REGULATIONS

28 U.S.C. § 1254(1) 2
29 U.S.C. § 213(a)(1) 2
29 C.F.R. § 541.1 2
29 C.F.R. § 541.2 2
29 C.F.R. § 541.5d ..... *passim*
29 C.F.R. § 541.118 ..... *passim*
29 C.F.R. § 541.118(a)(5) ..... *passim*
29 C.F.R. § 541.118(a)(6) ..... *passim*
56 Fed. Reg. 45824 ..... 2, 4
56 Fed. Reg. 45828 ..... 2, 4
57 Fed. Reg. 37666 ..... *passim*
57 Fed. Reg. 37674 15
57 Fed. Reg. 57675 15
H.R. 5112, 102d Cong., 2d Sess. (May 1992) 8
H.R. Rep. No. 93-913, 93d Cong., 2d Sess. 27 (1974), *reprinted in* 1974 U.S.C.C.A.N. 2811, 2837) 8
S. 1670, 102d Cong., 1st Sess. (August 1991) 8
S. 3089, 102d Cong., 2d Sess. (July 1992) 8

ARTICLES

Lawrence Peikes, "Tightening the White Collar Exemptions—the Court Breaths New Life into the Fair Labor Standards Act," 10 *The Labor Lawyer* 121 (1994) 15, 16
Peikes, 10 *The Labor Lawyer* at 136-140; and The Thompson Group, *Fair Labor Standards Handbook for State, Local Governments and Schools* (Washington, D.C., 1989, supplemented monthly), at Section 222, at 32-33 16

IN THE

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OCTOBER TERM, 1995

No.

FRANCIS BERNARD AUER, *et al.*,
Petitioners,

v.

DAVID A. ROBBINS, *et al.*,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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PETITION FOR WRIT OF CERTIORARI

Francis Auer, *et al.*, the Plaintiffs in the District Court for the Eastern District of Missouri, Eastern Division and the Appellants/Cross Appellees in the Eighth Circuit Court of Appeals, petition for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Eighth Circuit in *Francis Bernard Auer, et. al. v. David A. Robbins, et al.*, 65 F.3d 702 (8th Cir. 1995).

OPINIONS BELOW

The Court of Appeals opinion is reported at 65 F.3d 702 (8th Cir. 1995) and is reproduced as Appendix A in a separately bound Appendix to this *certiorari* petition (hereinafter "Pet. App."). (Pet. App. 1a-35a).

The District Court for the Eastern District of Missouri's memoranda and orders dated October 31, 1991, and April 22, 1994, are unreported and are reproduced as Ap-

pendices B, C, D, and E. (Pet. App. 36a-74a). The District Court's final judgment dated August 26, 1994 is unpublished and is reproduced as Appendix D. (Pet. App. 67a-68a).

JURISDICTIONAL STATEMENT

The Court of Appeals' opinion and judgment were entered on September 8, 1995. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). No petitions for rehearing or hearing *en banc* were filed.

STATUTES AND REGULATIONS

Section 213(a)(1) covering exemptions from the Fair Labor Standards Act (hereafter "FLSA"), 29 U.S.C. § 213(a)(1), is reproduced as Appendix F. (Pet. App. 75a).

The Secretary of Labor's FLSA regulations set out at 29 C.F.R. § 541.1 (the executive exemption rule), § 541.2 (the administrative exemption rule), § 541.118 (the salary basis rule), § 541.118(a)(5) (the non-safety related disciplinary pay docking rule), § 541.118(a)(6) (the "window of correction" rule), and § 541.5d (the special salary basis rule applicable to employees of public agencies) and 56 Fed. Reg. 45824 and 45828 (notices of rule making relating to 29 C.F.R. § 541.5d) are reproduced in Appendix F. (Pet. App. 76a-101a).[1] The final

[1] This Court designates as "legislative regulations" those regulations that are issued pursuant to "an express delegation of authority to [an] agency to elucidate a specific provision of [a] statute by regulations." *Chevron USA v. Natural Resources Defense Council*, 467 U.S. 837, 843-44 (1984).

The FLSA contains in 29 U.S.C. § 213(a)(1) such an express delegation to the Department of Labor to define "executive, professional and administrative employees." The regulations set forth in 29 C.F.R. § 541.1-2 and § 541.5d are clearly such legislative regulations. 29 C.F.R. Part 541A of the FLSA exemption regulations are headed "General Regulations" and are generally designated the "legislative" regulations under the Act; DOL's "interpretations"

rule in 29 C.F.R. § 541.5d was published with DOL's comments on the salary basis test in the public sector and the disciplinary docking rule in 57 Fed. Reg. 37666 (August 19, 1992) and is reproduced in Appendix K. (Pet. App. 184a-216a).

STATEMENT OF THE CASE

1. The FLSA, provides a "white collar" exemption for "executive, administrative, and professional employees" "as such terms are defined and delimited from time to time by regulations of the Secretary [of Labor]." *See* FLSA § 13(a)(1), 29 U.S.C. § 213(a)(1). (Pet. App. 75a). The regulatory pre-conditions to exempt status include two tests: a duties test and a salary basis test. An employer has the burden of establishing that an employee fulfills the requirements of both the duties and the salary basis test prior to exempting that employee from the FLSA's minimum wage and overtime at time and one half rules. *See*, 29 C.F.R. § 541.1 and § 541.2.[2] (Pet. App. 76a-80a).

of the "general" or "legislative" regulations in 29 C.F.R. Part 541A are set forth in 29 C.F.R. Part 541B. The discussion of the "salary basis" test in § 541.118 is contained in the Code of Federal Regulations within those sections of Part 541B headed "interpretations." However, unlike some of the 541B interpretations, § 541.118 is expressly incorporated into the "legislative" regulations of 541A through § 541.5d which limits reliance on its public sector modification of the salary basis pay docking rules to a "Federal, State or local government employee who otherwise meets the requirements of § 541.118."

[2] The basic two test approach has been in place since 1940. 5 Fed. Reg. 4077 (1940), §§ 541.1(e), 2(a) and 3(b). In 1949, the DOL amended the regulations. Since that time the salary basis test has been nearly identical to 29 C.F.R. § 541.118(a). *See*, 29 Fed. Reg. 7730, 7735 (1949). In 1954, DOL further elaborated the salary basis test. *See*, 19 Fed. Reg. 4405, 4406 (1954). Finally, effective September 18, 1991, the salary basis test was amended by adding § 541.5d with regard to public employees to provide that so long as a public employee otherwise meets the salary basis requirements of § 541.118, the employee would not

A special rule with regard to the application of the salary test to public employees allows exempt public employees to be subject to part-day docking for absences for personal reasons of less than one day *but* disallows rules making public employees subject to non-safety related disciplinary pay docking in an FLSA pay period. *See*, 29 C.F.R. § 541.5d and § 541.118(a)(5); and 57 Fed. Reg. 37673-37674. (Pet. App. F, 82a, 85a and Pet. App. K, 184a).[3]

A "window of correction" rule provides that "where a deduction not permitted . . . is inadvertent, or is made for reasons other than lack of work, the exemption will not be lost *if the employer reimburses the employee for such deductions and promises to comply in the future.*" *See*, 29 C.F.R. § 541.118(a)(6). (emphasis added) (Pet. App. 82a).

2. The St. Louis Police Department employs all of the Petitioners, for all relevant periods, as police sergeants and, in one case, as a lieutenant. The Department treats the Petitioners as exempt employees under the FLSA and does not pay them time and one half compensation for overtime. The Petitioners are "subject to" the disciplinary provisions of the Department's Police Manual, Chapter 7. (Pet. App. G, 102a). Under the Manual all Petitioners are "subject to" disciplinary suspension of less than a

be disqualified as exempt on the basis that the employee's pay is subject to docking for part day absences. *See*, 56 Fed. Reg. 45824 and 45828 and 57 Fed. Reg. 37666.

[3] The DOL's publication of the final revised rule now in § 541.5d discussed commenters' suggestions that § 541.118(a)(5) be repealed to allow non-safety related disciplinary deductions from public employees' pay. The DOL considered and rejected the suggestions. The final revisions left the salary basis test in place in the public sector, although modified from the private sector rule, to allow pay docking for part day absences. The provision against non-safety disciplinary deductions in any work period in which the public employee had FLSA work time was preserved. (Pet. App. K).

full work period for infractions of over 40 non-safety related rules. (Pet. App. 107a-113a, 122a, and 143a-149a).

Two years after the 1988 filing of the complaint in this case, Petitioner Sergeant Michael Guzy received a two-day suspension without pay for violating the city's residence requirement. (Pet. App. 8a). On June 1, 1991, subsequent to Sergeant Guzy's suspension, the Department revised the Manual to provide termination as the exclusive sanction for violating the City's residence requirement but otherwise left in place the rules making all sergeants and lieutenants subject to partial work period disciplinary suspension for over 40 other non-safety reasons. (Pet. App. L, 217a). Sergeant Guzy's lost wages have never been reimbursed.[4]

3. Petitioners Police Sergeants Auer, Day and Hill, and eventually 286 additional similarly situated Petitioners, including one police Lieutenant, Manual Delgado, instituted this suit in the United States District Court for the Eastern District of Missouri on October 25, 1988. They challenged the Police Department's treatment of them as FLSA exempt employees. The complaint raised claims both that (1) all of the Petitioners were hourly, and not salaried employees, and, therefore, could not be exempt from the FLSA, and (2) that the Petitioners duties were not exempt duties.

On October 30, 1991, the district court granted the Police Department's motion for partial summary judgment holding that Lieutenant Delgado's duties were ex-

[4] No claim has ever been made that Guzy's post-litigation loss of pay has ever, in fact, been reimbursed. Respondents in their brief on appeal to the Eighth Circuit have merely stated:

> *If deemed necessary*, the Police Board should be given an opportunity to reimburse Sergeant Guzy for the two (2) days pay lost in 1990 as a result of the suspension so that his salaried status is unaffected. Respondent's Eighth Circuit Brief at 9. (emphasis added) (Pet. App. L, 219a).

empt and that St. Louis police sergeants and Lieutenants were salaried and not hourly. (Pet. App. 6a and 71a-74a.)

The case proceeded to a five day bench trial. The district court then found that most sergeants' positions performed exempt executive duties, three sergeants' positions were exempt under the administrative exemption, and one sergeant's position was exempt under the combined exemption. The district court also found that two sergeants' positions were partially non-exempt from the FLSA. Both parties appealed the decision.

On September 8, 1995, the Court below upheld the district's decision in part and reversed it in part. The Court of Appeals found that all of the positions in question involved exempt duties and that all of the Petitioners were salaried and not hourly employees. (Pet. App. 1a-35a).

4. This petition questions the Court of Appeals' application of the salary basis test. (Pet. App. 7a-10a). The Court, first, dealt with the "disciplinary deduction rule" and the fact that all Petitioners were, in fact, "subject to" disciplinary deductions of less than a full pay period for any of more than 40 violations of non-safety rules ranging from "violation of appearance standards" (Rule § 10.002) or "failure to follow radio procedures" (Rule § 7.004(gg)) to "drinking on duty (Rule § 7.004(e)). (Pet. App. 143a-149a). Based on its earlier decision in *McDonnell v. Omaha*, 999 F.2d 293, 296 (8th Cir. 1993), *cert. denied*, 114 S. Ct. 1188 (1994), the Court held that "the mere possibility of an improper deduction in pay does not defeat an employee's salaried status."

Second, through its aplication of the "window of correction" rule in 29 C.F.R. § 541.118(a)(6), the Court addressed the fact that Sergeant Guzy had, in fact, been subjected to a post-litigation, intentional (not inadvertent) non-safety disciplinary deduction of less than a full

pay period. The Court held that the actual deductions suffered by Sergeant Guzy were corrected by a subsequent, post-litigation amendment to the Police Manual, which revised only the specific rule of the disciplinary code which Guzy had violated, a residency requirement, by making the sole penalty for such a violation dismissal. The Court so found even though there remained over 40 Police Manual rules subjecting Sergeant Guzy, and all the Petitioners, to suspensions of less than a full pay period. The Court further held that 29 C.F.R. § 541.118(a)(6) "simply require[s] that the employer reimburse the employee the lost wages." Again, this occured in face of the fact that the docking here occurred while the litigation was pending. Neither the district court nor the Court of Appeals found that Sergeant Guzy had, in fact, been reimbursed for the lost pay he suffered. No such finding was possible since no such reimbursement ever occurred. The Eighth Circuit held that an appellate brief's promise to reimburse *if required by a Court to do so* sufficed to transform a non-exempt to an exempt employee.

5. Petitioners seek this Court's review of the holdings of the Eighth Circuit with regard to the salary basis test, specifically, its application of the "disciplinary docking" and 'window of correction" rules.

As Table A below demonstrates, the Court of Appeals' approach conflicts with that of other Circuits. (Exhibit to this petition). There is a severe and confused division among the Circuits with regard to the salary basis test, and its "disciplinary deduction" and the "window of correction" rules.

Further, the Court of Appeal's application of the "disciplinary deduction" and the "window of correction" rules is—

> (a) at odds with the "legislative" regulations of the United States Department of Labor which are entitled to special deference, *See, Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984);

(b) at odds with the DOL's, the agency charged by Congress with application the FLSA, interpretation of its own regulations which has withstood Congressional reconsideration of the FLSA and specific tailoring of the Act to public employees and so is "persuasive evidence that the interpretation is one intended by Congress,"[8] *See NLRB v. Aerospace Co. Div. of Texton*, 416 U.S. 267, 274-275 (1974); and

(c) at odds with rules that were not changed when, in 1991 and 1992, Congress specifically considered FLSA amendments which would have similarly changed DOL's application of the salary basis test to the public sector and refused to do so; *See*, S. 1670, 102d Cong., 1st Sess. (Aug. 2, 1991); S. 3089, 102d Cong., 2d Sess. (July 28, 1992); and H.R. 5112, 102d Cong., 2d Sess. (May 1992).

Questions concerning whether the application of DOL's salary basis regulations are valid as applied to public

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[8] The Secretary of Labor's application of the "salary basis" test to the public sector is fully consistent with Congressional intent. When Congress brought all public employees within the coverage of the FLSA in 1974, "providing that virtually all non-supervisory government employees will be covered" (H.R. Rep. No. 93-913, 93d Cong., 2d Sess. 27 (1974), *reprinted in* 1974 U.S.C.C.A.N. 2811, 2837), it certainly was aware of the Secretary's "salary basis" test, which was identified as the regulation now in place.

In 1985, this Court held that the FLSA may constitutionally regulate the wages and hours of public employees. *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985). In the wake of *Garcia*, Congress reviewed the FLSA and its application to the public sector and enacted the Fair Labor Standards Amendments of 1985, 99 Stat. 790 (1985), to tailor the Act specifically to the public sector. New provisions were added to the FLSA to allow, for example, the use of compensatory time off, to establish a high overtime trigger in some cases, to allow special joint employment and volunteer rules, and to provide for a special compliance period. The 1985 Amendment did not, however, affect § 13(a)(1) of the Act or suggest the need for change in the rules regarding the salary basis test, disciplinary suspensions of exempt employees, or the window of correction.

employees are currently before this Court in three other petitions, each of which emphasizes the fact that this controversy raises an important issue of federal law and is the topic of a severe and confused conflict among the Circuits. *Mueller v. Reich*, Case No. 95-586 (1995); *Michigan Supervisors' Office & Professional Employees Inter'l Union v. Michigan Department of Corrections*, Case No. 96-688 (1995); and *Service Employees International Union, Local 102 v. County of San Diego*, Case No. 95-724 (1995).

This Court has emphasized that the "breadth of coverage" of the FLSA's overtime hours rules is "vital to [its] mission" of establishing a national work week standard and that statutory exemptions to the Act should be narrowly construed. *Powell v. United States Cartridge Co.*, 399 U.S. 497, 516 (1950); and *Mitchell v. Kentucky Finance Co.*, 359 U.S. 290, 295 (1959). The presumption is that an employee is not exempt. Exemptions must be established by an employer by "clear and affirmative evidence" that each employee for whom an exemption is claimed is entitled to a *bona fide* exemption under the Department of Labor's regulations. Under the FLSA, the employer carries the burden of proving the applicability of each exemption. *Corning Glass Works v. Brennan*, 417 U.S. 188, 196-197 (1974). DOL regulated "[e]xemptions are to be narrowly construed and limited to those unmistakenly and plainly within their terms and spirit." *Arnold v. Ben Kewosky, Inc.*, 361 U.S. 388, 392 (1960).

REASONS FOR GRANTING THE PETITION

I. A SEVERE AND CONFUSED CONFLICT EXISTS AMONG THE COURTS OF APPEALS AS TO THE APPLICATION OF THE FLSA SALARY BASIS TEST, ITS DISCIPLINARY DOCKING RULE, AND THE WINDOW OF CORRECTION

1. *Circuit Courts of Appeals' Recognition of Conflict In Circuits.* In June 1993, Judge Silberman of the D.C. Circuit, writing for a panel of himself, Judge Wald and Judge Ginsberg in *Kinney v. District of Columbia*, 994 F.2d 6 (D.C. Cir. 1993), wrote that—

> . . . the application of [the FLSA salary test, docking rules and window of correction] in 29 C.F.R. § 541.118(a) to governmental employees has given rise to a sharp split, both between judges in this circuit and between circuits. 994 F.2d at 11 (citations omitted).

He discussed a split among district court opinions within the District of Columbia comparing *Harris v. District of Columbia*, 709 F. Supp. 238, 241 (D.D.C. 1989) (requiring a showing of actual deductions) and *District of Columbia Nurses' Ass'n v. District of Columbia*, 1988 U.S. Dist. Lexis 16500 (D.D.C. 1988) (also requiring actual deductions) with *D'Camera v. District of Columbia*, 693 F. Supp. 1208, 1212 (D.D.C. 1988) (applying simply a "subject to" discipline rule).

More importantly, Judge Silberman pointed out a triple division among circuits comparing *Atlantic Firefighters v. City of Atlanta*, 920 F.2d 800, 805 (11th Cir. 1991) (requiring actual deductions) to *Michigan Ass'n of Government Employees v. Michigan Department of Corrections*, 992 F.2d 82 (6th Cir. 1993) (requiring actual deductions when a deduction policy is ambiguous but not otherwise) to *Abshire v. County of Kern*, 908 F.2d 483, 487 (9th Cir. 1990), *cert. denied*, 498 U.S. 1068 (1991) (applying only a "subject to" rule); and comparing *Abshire* and *Brock v. Claridge Hotel and Casino*, 846

F.2d 180, 184-85 (3d Cir. 1987), *cert. denied*, 488 U.S. 925 (1988) (finding that recording and compensating for overtime inconsistent with the salary basis test) with *Hartman v. Arlington County*, 720 F. Supp. 1227, 1229 (E.D. Va. 1989), *aff'd*, 903 F.2d 290 (4th Cir. 1990) (finding that recording and compensating for overtime not inconsistent with the test).

In *Kinney*, the D.C. Court of Appeals found divisions between the Ninth and the Eleventh Circuits, with additional complications from the Third, Fourth and Sixth Circuits. The D.C. Circuit joined with the Ninth and avoided the issues raised in the Third, Fourth and Sixth Circuits.

One month after Judge Silberman's dissection, Eighth Circuit Judge Gibson struggled further with § 541.118(a) and, in *McDonnell v. Omaha*, 999 F.2d 293, 297 (8th Cir. 1993), noted an even wider split, pitting the Second, D.C., Sixth, Seventh, and Ninth Circuits against the Fifth and Eleventh Circuits. The Eighth Circuit in *McDonnell* joined the Fifth and Eleventh Circuits.

Two years later, in May 1995, Fifth Circuit Judge Reavey, sitting by designation, wrote for the Tenth Circuit in *Aaron v. City of Wichita*, 54 F.3d 662 (10th Cir., 1995) noting the same divergence—this time among the Second, D.C. and Ninth Circuits, on one hand, and the Fifth, Eighth and Eleventh Circuits, on the other. The Tenth Circuit avoided choosing sides, ruling that the City of Wichita had neither an express mandatory docking rule nor a practice of actual docking, but leaned toward the iSxth Circuit's "actual docking" rule.

In May 1995, Judge Posner, of the Seventh Circuit, held that the salary test rule in § 541.118(a) is valid as applied by the Department of Labor in the public sector because it is rationally related to the objectives of the FLSA. *Mueller v. Reich*, 54 F.3d 438, 442 (7th Cir. 1995), *cert. pending*, Case No. 95-586 (1995). The division among the circuits continued to widen when, in

August, the Ninth Circuit confused matters further by holding that the entire salary basis test was invalid in the public sector. *SEIU v. San Diego*, 35 F.3d 483 (9th Cir. 1994), *en banc, denied, supp. op.* 60 F.3d 1346 (9th Cir. 1995), *cert. pending*, Case No. 95-724 (1995).

There is a severe and confused division in the Circuits concerning each of the principle legal rules applied here—

(1) *The Salary Basis Test in the Public Sector.* Whether the salary test in 29 C.F.R. § 541.5d and § 541.118, applies at all in the public sector;

(2) *Disciplinary Docking: "Subject to" or Actual.* Whether an employer rule subjecting employees to non-safety discipline for part of a work period prevents exemption under 29 C.F.R. § 541.118(a)(5);

(3) *"Window of Correction:" Only for Mistakes or Liberally Available.* Whether an employer is entitled to use a window of correction under 29 C.F.R. § 541.118(a)(6) to avoid losing exempt status for improper deductions from otherwise exempt employees, rarely, and only in the case of a true mistake which is corrected fully by reimbursement of any docking and full revocation of the deductions.

2. *Table A: "FLSA Salary Test Conflicts In Circuits."* The division in the Circuits on these issues is severe, confusing and growing. Table A depicts its breadth. (Exhibit to this petition).

II. THE DECISION BELOW CONTAINS AN ERRONEOUS INTERPRETATION OF AN IMPORTANT QUESTION OF FEDERAL LAW RELATING TO THE FLSA SALARY BASIS TEST, ITS DISCIPLINARY DOCKING RULE, AND THE FLSA WINDOW OF CORRECTION

The Eighth Circuit's decision below is not only in conflict with other circuits, it is also incorrect. Apparently ignoring the Department of Labor's regulations, the Eighth Circuit reached a decision which contradicts a reasonable interpretation adopted by the Labor Department of its own regulations concerning the application of the salary basis test in the public sector, its disciplinary docking rule, and the window of correction.

1. *Disciplinary Docking: "Subject To" vs. Actual.* According to the Court below, under 29 C.F.R. § 541.-118(a)(5), the "mere possibility of an improper deduction in pay does not defeat the employee's salaried status." (Pet. App. 8a). The Court of Appeals would have the rule be that improper deductions result in loss of exempt status only for the particular employee actually docked pay and only for the work period of the improper deduction. As discussed above, the Eighth Circuit "mere possibility" standard is the minority rule, followed by the Fifth[6] and Eleventh[7] Circuits. The Second,[8] D.C.,[9] Fourth,[10] Sixth,[11] Seventh[12] and Ninth[13] Circuits have

[6] *York v. Wichita Falls*, 994 F.2d 236 (5th Cir. 1991).

[7] *Atlanta Professional Firefighters v. Atlanta*, 920 F.2d 800 (11th Cir. 1994).

[8] *Martin v. Malcom Pernie*, 949 F.2d 611, 615 (2nd Cir. 1991), *cert. denied*, 13 S.Ct. 298 (1992).

[9] *Kinney v. District of Columbia*, 994 F.2d 6 (D.C. Cir. 1993).

[10] *Shockley v. Newport News*, 997 F.2d 236 (4th Cir. 1991).

[11] *Michigan Ass'n of Gov't Employees v. Dept. of Corrections*, 992 F.2d 82 (6th 1993).

[12] *Klien v. Rush-Presbyterian*, 990 F.2d 279, 289 (7th Cir. 1993).

[13] *Abshire v. County of Kern*, 908 F.2d 483 (9th Cir. 1990), *cert. denied*, 498 U.S. 1068 (1991).

adopted a rule that an employer's policies making an employee's compensation "subject to" deduction, and not actuál deductions (which, of course, would only occur in cases of disciplinary infraction), is determinative of whether purportedly exempt employees are paid on a salary basis. This stricter "subject to" rule is clearly used by the Department of Labor. *See,* Lawrence Peikes, "Tightening the White Collar Exemptions—The Court Breathes New Life into the Fair Labor Standards Act," 10 *The Labor Lawyer* 121 at 125-136 (1994). The specific "subject to deduction" language contained in § 541.118(a) establishes that it is sufficient that an employee works under rules which provide that the employee's compensation could be reduced by a suspension without pay for less than a full pay period. The Sixth Circuit has outlined the practical reasons for the rule—

> We choose to focus on the actual policy, rather than whether the policy has ever been administered for two reasons. First, this approach is more consistent with the regulatory language defining a salaried employee as one who is paid "a predetermined amount which is not *subject* to reduction because of variations in the quality or quantity of his work." Also, this approach is more consistent with the general notion of a salaried employee; as the *Abshire* court stated "either pay is fixed and immutable, and not subject to deductions, or it is contingent." Second, focusing on the actual policy is more practical and realistic. Employees subject to reduction in pay will, of course, attempt to avoid these deductions by juggling schedules and sacrificing non-work opportunities. Simply because a reduction in pay has never been applied does not mean that the employee has not been affiected by the policy subjecting the employee to pay reduction. *Michigan Ass'n of Government Employees v. Michigan Dep't of Corrections,* 992 F.2d 82, 86 (6th Cir. 1993).

Entitling only those employees who actually suffer disciplinary deductions to overtime pay, while keeping it from

those "subject to" discipline but not deserving of it, would have the odd consequence of granting overtime pay protection only to those who engage in conduct for which they may be disciplined while keeping overtime pay protection from those who comply with the employer's rules and regulations.

There is no confusion about the position of the Department of Labor on this point. In its August 19, 1992, publication of the final rule currently controlling public sector exemptions, 29 C.F.R. § 541.5d (incorporating by reference § 541.118(a)(5)'s disciplinary docking rule), the Department of Labor specifically responded to a comment on the regulations from the City of Chicago which suggested that the new rule on improper deductions be patterned "so that the exemption would be lost only in the weeks in which deduction(s) occur"—

> The Department considers the suggested change to be a significant departure from long-standing policy that is not substantiated by the comment. Nor has any basis been presented to give special treatment in this regard to the public sector. It has, therefore, not been adopted in the final rule. 57 Fed. Reg. 57675 (August 19, 1992). (Pet. App. K, 211a)

See also, the comments on the preservation of the public sector salary test and the disciplinary deduction rule, 57 Fed. Reg. 37674 (August 19, 1992). (Pet. App. K, 208a, 209a). The Eighth Circuit's interpretation of "subject to" disciplinary deductions cannot be reconciled with the clear interpretations with the DOL.

2. *Window of Correction: "Inadvertent" or "For Reasons Other Than Lack of Work"—Conjunctive or Disjunctive.* In this case, the Police Department's Manual makes sergeants and lieutenants "subject to" disciplinary deductions for violations of more than 40 rules, and the record shows an actual post-litigation, two-day deduction from a police sergeant who violated the portion of the disciplinary rules requiring St. Louis residency. However,

the Eighth Circuit held that 29 C.F.R. § 541.118(a)(6) provides a "window of correction" to any employer who revised the residency requirement post-litigation to provide only for dismissal and announces in a post-appeal brief an intent to reimburse the employee for the lost wages but, only if required by the Appellate Court to do so. (Pet. App. 10a, and Pet. App. L, 219a). The general Police Manual rule subjecting the petitioners to disciplinary suspensions for more than 40 offenses was not repealed or revised (only its application to residency violations was changed) and the compensation lost was not actually reimbursed. This is a view of 29 C.F.R. § 541.118(a)(6) clearly at odds with the "window of correction" interpretation of the Department of Labor.

The Department of Labor's interpretation of the "window of correction" is that it is only available in the case of actual mistakes where no formal policy provides for non-safety deductions, where all of the rules subjecting the employees to non-safety discipline for less than a full work period are repealed, and where an actual return of any deductions has been made. The DOL view is best outlined in the *Martin v. Malcom Pernie, Inc.*, 949 F.2d 611 (2d Cir. 1991), *cert. denied*, 113 S. Ct. 198 (1992), where the Second Circuit accepted and adopted the view pressed by the Secretary of Labor plaintiff, and in *Klein v. Rush-Presbyterian-St. Luke's Medical Center*, 990 F.2d 279 (7th Cir. 1993). *See*, Peikes, 10 *The Labor Lawyers* at 136-140; and The Thompson Group, *Fair Labor Standards Handbook for State, Local Governments and Schools* (Washington D.C., 1989, supplemented monthly), § 222, at 32-33.

3. *Deference To The DOL.* Under this Court's mandate in *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1983), the Eighth Circuit erred when it refused to follow the Department of Labor's interpretation of its rules on disciplinary docking and the window of correction. The DOL's reasonable construction

is due deference and is controlling even if the Circuit Court's own construction were equally reasonable.

In this case, the Eighth Circuit's interpretation ignores the clear wording of the regulation which requires that the employer actually repeal disciplinary rules calling for suspensions without pay and actually reimburse the compensation deductions actually made. The record here is clear. The St. Louis Manual provisions calling for disciplinary suspensions has not been repealed or revoked—only amended to revise one of more than 40 disciplinary infractions by requiring that were it to re-occur, dismissal would result. The Court relied only on a promise, in Respondent's appellate pleading, of possible future reimbursement conditioned on an order of the Court to reimburse. (Pet. App. L, 219a). The sergeant actually docked has not been reimbursed.

The Eighth Circuit's rendition of the "disciplinary docking" and "window of correction" rules is not reasonable. The Secretary of Labor's reading is entirely so. Due reference to the agency responsible for FLSA enforcement requires that the Eighth Circuit's theory does not replace DOL's interpretation of its own rules.

CONCLUSION

For the reasons set forth above, Petitioners respectfully request that this petition for a writ of *certiorari* be granted.

Respectfully submitted,

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EXHIBIT

EXHIBIT

TABLE A: FLSA SALARY TEST CONFLICTS IN CIRCUITS

Circuit		1st	2nd	3rd	DC	4th	5th	6th	7th	8th	9th	10th	11th	DOL
FLSA Salary Basis Test & "Subject To" Discipline 29 C.F.R. Sec. 541.5d and 541.118(a)(5)														
Express Indication of Conflict		—	—	—	YES #4	—	—	—	—	YES #18	—	YES #24	—	-
Salary Test In Public Sector		—	YES #1	—	YES #3 #4	YES #5 #6 #7 #8	YES #9	YES #10 #11	YES #15 #16	YES #17 #18	NO #22 YES #19 #20 #21	YES #23 #24	YES #25 #26	YES
Subject to Deduct Enough		—	YES #1 #2	—	YES #4	YES #6 #7	?	YES #10	YES #14 #15 #16	NO #17 #18	YES #19 #21	NO #23 #24	NO #25 #26	YES
Actual Deduct Needed		—	NO #1 #2	—	NO #4	NO #6 #7	?	NO #10	NO #14 #15 #16	YES #17 #18	NO #19 #21	YES #23 #24	YES #25 #26	NO
Actual Deduct Resolves Ambiguity		—	—	—	—	—	—	YES #10 #11	—	—	YES #20	YES #23 #24	—	YES
Leave Deduct Enough		—	YES #2	—	—	—	NO #9	—	—	NO #18	? #19 #20	NO #24	—	NO
Anti-discipline Rule Applied		—	YES #1	—	YES #4	YES #6 #7 #8	—	—	YES #14 #15	YES #17 #18	YES #19	—	YES #26	YES

TABLE A: FLSA SALARY TEST CONFLICTS IN CIRCUITS

FLSA Salary Basis Test & "Window of Correction" 29 CFR Sec. 541.118(a)(6)														
Circuit		1st	2nd	3rd	DC	4th	5th	6th	7th	8th	9th	10th	11th	DOL
Win'w of Correct Discuss.		—	YES #2	—	—	YES #6 #7 #8	—	YES #12 #13	YES #14	YES #17	YES #19	—	YES #27	YES
Disj'tv Actual Loss Needed		—	NO #2	—	—	NO #6 #7	—	YES #12 #13	NO #14	YES #17	NO #19	—	YES #27	NO
Conj'tv Subject To Enough		—	YES #2	—	—	YES #6 #7	—	NO #12 #13	NO #14	NO #17	YES #19	—	NO #27	YES
Formal Policy Enough		—	YES #2	—	—	YES #6 #7 #8	—	NO #12 #13	YES #14	NO #17	YES #19	—	NO #27	YES
Total Reveals Rule Needed		—	YES #2	—	—	YES #6 #7 #8	—	YES #12 #13	YES #14	NO #17	YES #19	—	YES #27	YES
Advance Actual Repayment Needed		—	YES #2	—	—	YES #6 #7 #8	—	YES #12 #13	YES #14	NO #17	YES #19	—	YES #27	YES

KEY: Numbers (# __) reference relevant Court of Appeals' precedent.
Full case citations listed by number on following pages.

CASE CITATIONS BY NUMBER:

1st Cir:

No Cases.

2nd Cir:

#1 *Whitmore v. Port Authority*, 907 F.2d 20 (2d Cir. 1990).

#2 *Martin v. Malcolm Pirnie, Inc.*, 949 F.2d 611 (2d Cir. 1991), *cert. denied*, 1135 S. Ct. 298 (1992).

3rd Cir:

No Cases.

D.C. Cir:

#3 *Hilbert v. District of Columbia*, 23 F.3d 429 (D.C. Cir. 1994).

#4 *Kinney v. District of Columbia*, 994 F.2d 6 (D.C. Cir. 1993).

4th Cir:

#5 *Allen v. County of Fairfax*, 127 Labor Cas. Para. 33,649 (4th Cir. 1994).

#6 *Shockley v. Newport News*, 997 F.2d 18 (4th Cir. 1993).

#7 *IAFF v. Alexandria*, 720 F. Supp. 1230 (E.D. Va.), *aff'd*, 912 F.2d 463 (4th Cir. 1989).

#8 *Hartman v. Arlington County*, 720 F. Supp. 1227 (E.D. Va. 1989), *aff'd*, 903 F.2d 290 (4th Cir. 1990).

5th Cir:

#9 *York v. Wichita Falls*, 994 F.2d 236 (5th Cir. 1991).

6th Cir:

#10 *Michigan Ass'n of Government Employees v. Department of Corrections*, 992 F.2d 82 (6th Cir. 1993).

#11 *Michigan Supervisors' Office & Professional Employees Int.'l Union v. Department of Corrections*, 1995 U.S. App. Lexis 19956 (6th Cir. July 13, 1995), *cert. pending*, Case No. 95-688 (1995).

#12 *Reich v. Pierce*, 1994 U.S. App. Lexis 36194 (6th Cir. 1994). (Pet. App. I).

#13 *Martin v. Monks*, 1993 U.S. App. Lexis 20610 (6th Cir. 1993). (Pet. App. H).

7th Cir:

#14 *Klien v. Rush-Presbyterian*, 990 F.2d 279 (7th Cir. 1993).

#15 *Bankston v. Illinois*, 60 F.3d 1249 (7th Cir. 1995).

#16 *Mueller v. Reich*, 54 F.3d 438 (7th Cir. 1995), *cert. pending*, Case No. 95-586 (1995).

8th Cir:

#17 *Auer v. Robbins*, 65 F.3d 702 (8th Cir. 1995).

#18 *McDonnell v. Omaha*, 999 F.2d 293 (8th Cir. 1993), *cert. denied*, 1145 S.Ct. 1188 (1994).

9th Cir:

#19 *Abshire v. County of Kern*, 908 F.2d 483 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 785 (1991).

#20 *Barner v. Navato*, 17 F.3d 1256 (9th Cir. 1994).

#21 *Hurley v. Oregon*, 27 F.3d 392 (9th Cir. 1994).

#22 *SEIU v. San Diego*, 35 F.3d 483 (9th Cir. 1994), *en banc denied, supp. op.* 60 F.3d 1346 (9th Cir. 1995), *cert. pending*, Case No. 95-724 (1995).

10th Cir:

#23 *Aaron v. Wichita*, 54 F.3d 652 (10th Cir. 1995).

#24 *Bennett v. Albuquerque*, 1995 U.S. App. Lexis 8901 (10th Cir. April 18, 1995). (Appendix J).

11th Cir:

#25 *Atlanta Professional Firefighters v. Atlanta*, 920 F.2d 800 (11th Cir. 1991).

#26 *Avery v. Talladego*, 24 F.3d 1337 (11th Cir. 1994).

#27 *Lee v. Flightsafety*, 20 F.3d 428 (11th Cir. 1994).

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

FRANCIS BERNARD AUER, *et al*,
Petitioners,

v.

DAVID A. ROBBINS, *et al.*,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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222

TABLE OF CONTENTS FOR APPENDIX

APPENDIX A: Page

United States Court of Appeals For The Eighth Circuit, Decision *AUER v. ROBBINS*, slip. op. No. 94-3355/3534 (8th Cir. Sept. 8, 1995) 1a

APPENDIX B:

United States District Court Findings and Conclusions of Law Entered April 22, 1994 ..... 36a

APPENDIX C:

United States District Court Order Entered April 22, 1994 ..... 64a

APPENDIX D:

United States District Court Order and Entry of Final Judgment Entered August 26, 1994 ..... 67a

APPENDIX E:

United States District Court Memorandum and Order Entered October 30, 1991 ..... 68a

APPENDIX F:

29 U.S.C. § 213(a) (1) 75a

29 C.F.R. Part 541.1 ..... 76a

29 C.F.R. Part 541.2 ..... 78a

29 C.F.R. Part 541.118 ..... 80a

29 C.F.R. Part 541.5d 85a

56 Fed. Reg. 45824 (Sept. 6, 1991) 86a

56 Fed. Reg. 45828 (Sept. 6, 1991) 94a

APPENDIX G:

Police Manual, Metropolitan Police Dept. Rule 7, Complaint and Disciplinary Procedures 102a

TABLE OF CONTENTS—Continued

Page

APPENDIX H:

Martin v. W. E. Monks & Company, Case No. 92-3739 (6th Cir. 1993) 150a

APPENDIX I:

Reich v. Pierce, Case No. 93-3279/3446 (6th Cir. 1994) 162a

APPENDIX J:

Bennett v. Albuquerque, Case No. 94-2094 (10th Cir. 1995) 170a

APPENDIX K:

57 Fed. Reg. 37666 (August 19, 1992) 184a

APPENDIX L:

Appellants/Cross Appellees' Appendix to the Eighth Circuit, Testimony of Sergeant Michael Guzy, Trial Transcript at 68-69, Eighth Circuit App. at 314-315 ..... 217a

Brief of Appellees/Cross-Appellants to the Eighth Circuit at 9 ..... 219a

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 94-3355/3534

FRANCIS BERNARD AUER; CHRISTOPHER JAMES DAY; JAMES GILBERT HALL; FRANCIS B. CORONA; ANTHONY PONA; MICHAEL T. INDELICATO; RICHARD BUEHLER; JAMES E. LONG; ROY BURGDORF; DONALD SWANSON; LIONEL ABERNATHY; KENNETH ACKERMAN; ALFRED ADKINS; DUANE ALEXANDER; STEVE W. ALSUP; ROGER AMELUNG; JAMES ANDERSON; MICHAEL ANDERSON; EDWARD L. ATHERTON; ROOSEVELT BARNES, JR.; VERNON BARTON; RICHARD C. BARTRAM; LEE BATES; DARREL BATTLE; ROBERT W. BAYLESS; MICHAEL BECK; DENNIS BECKER; JOSEPH D. BEFFA; CHRIS BEFFA; MICHAEL BERGMAN; JOHN BILLINGS; MICHAEL BLANKS; LEONARD BOBER; DONALD L. BOHNERT; ROBERT L. BONZON; FRANK BOOKER; FRED BOYD; KENNETH M. BRADSHAW; ROBERT BRENNAN; JOSEPH BURGOON; JOHN M. BURKE; THOMAS BURKE; JAY BURKHARD; SHADRACH J. BURKS; AL CARTER; MICHAEL CARUSO; SALVATORE CHRUM; EARL COBB; WALTER COLLIER; DONALD COLUMBO; CLARENCE CONTESTABILE; PHILLIP P. CORNISH; DON CUMMINGS; STANLEY CUNNINGHAM; GORDON CURD; THOMAS J. DALEY; JEROME DAMPIER; ROBERT DAVIS; STEVE DEBISSCHOP; ROBERT DECKER; MANUEL DELGADO; EDWARD S. DICKERSON; LEMAN DOBBINS; JERRY DODSON; JAMES M. DOGGENDORF; STEPHEN DOUGHERTY; ROBERT DOWNEY; ROBERT J. DUFFIN; DANIEL DUFFY; JUDITH DUPIUS; JIMMIE LEE EADS; DONALD EBNER;

THOMAS ECKHARD; CARL EDWARDS; ROBERT E. FARRELL; LAWRENCE FLOWERS; JACKIE FOWLER; LEONARD G. FORSTING; LYNN D. FOX; TOMMY FRANKLIN; MICHAEL FREDERICK; NICK FREDERICKSON; DONALD M. FRENTZEL; BOB GAVIN; ROBERT GEORGE; RAYMOND L. GHRIST; WILKIE GLASENER; JAMES GLASSCOCK; THOMAS GODFREY; WILLIAM GOODEN; JOEL GRANT; EDWARD V. GRAVES; DARLA GRAY; JESSE GREEN; JOHN D. GREEN; ROBERT C. GRIFFIN, III; WARD GRIGGS; WILBURN GROVE; MIKE GUZY; DENNIS HAHN; KENNETH HAHN; ARTHUR HAMMER; ADOLPHUS HARDY, JR.; DONALD HARDY; STEVE HARMON; RALPH HARPER; EDWARD HARPER; PEGGY HARRIS; REGGIE HARRIS; HENRY G. HARRIS; GREGORY HAWKINS; MARK HELMHOLT; DONALD HENDERSON; RONALD HENDERSON; LEO HERTLING; STEPHEN HOBBS; SUSAN HOBBS; JOSEPH HOEING; ANDREW HOLLINS; JACK W. HUELSMANN; JACK HUESGEN; LLOYD HUGGANS; RILEY L. HUGHES, JR.; EDMUND RONALD JABLONSKI; MICHAEL JARVIS; ROY JOACHIMSTALER; CLETUS JOHNSON; JOE W. JOHNSON; JOHN JOHNSON; MICHAEL JONES; MILTON JONES; RICHARD JONES; ROBERT W. JONES; ROCHELLE JONES; TERRY KAELIN; DAVID E. KASSEBAUM; JOHN KAVADAS; ELMER KAVANAUGH; KENNETH KEGEL; GUINN KELLY; GENEVIEVE KELLY; DAVID KEOUGH; RONALD R. KLEIN; RONALD KLIER; ROBERT KLINGER; JEROME KLIPFEL; HOWARD KLOCKE; RODGER G. KOHLER; GUS KOLILIS; JEFFREY KOWALSKI; JUDITH A. KRAMER; JOSEPH KRISKA; ROBERT KRUGER; JOHN P. KUELKER; GARY KUKLA; EDWARD KUNTZ; WILLIAM KUSMEC; NORMAN LAND; WILLIAM LANDRUM; MICHAEL L. LAUER; THOMAS LEASSNER; FRANK LEBEAU; AUDREY L. LEE; LEO LEWIS; JOSEPH LIEVIN, JR.; LARRY DEAN LIGGETT; J.W. LOFTIN; JIM E. LONG; JIM H. LONG; EDWARD LONGINETTI; DONNA LOVE; DAVE LOWELL; MICHAEL LOWRY; EDWARD LYNCH; ANTHONETTE MADISON; EDWARD MAGEE; THOMAS J. MAGNAN; WARREN MALUGEN; JOSEPH

MARCINKIEWICZ, JR.; CHARLES MARVIN; PHILIP F. MAUGERI; CLYDE MCCANDLESS; MICHAEL MCGRAW; WILLIAM MCCULLER; JOSEPH MCCULLOCH; JOE MCDERMOTT; TIM MCDONOUGH; GEORGE MCDONNOUGH; TIMOTHY MCENTEE; JOHN MCKENZIE; EDWARD MESSMER; CHARLES METZNER; STANLEY MIERZEJEWSKI; EUGENE MILNE; PRESTON MOORE; RICHARD MOORE; JAMES MORAN; JOHN J. MORIARTY; PAT MORICI; BERT MORRIS; MARLIN MULLER; GERARD D. MURPHY; TIMOTHY MURPHY; JOSEPH MURPHY; FRANCIS J. MEYERS; ALBERT NAPIER; PAUL NEUDECKER; WORTHY NEWSOM; DANIEL NICHOLS; JOHN R. NIEMAN; TOM NIEMEYER; BEVERLY NOBLE-BARNES; LEROY NUNALLY; LAWRENCE O'TOOLE; DENNIS OBERDIECK; STEVE OLISH; RON OWENSBY; JOHN PAGE; MANSON PARKS; ROBERT PIEKUTOWSKI; JOHN P. PODOLAK; GARY POELLING; DENNIS POLLIHAN; WILLIAM PRIEST; JOSEPH PRIEST; BILLY QUALLS; DAN RECHTIEN; ABRAHAM REDDICK; JOE REYNOLDS; ANTHONY RICE; JACK EUGENE RICHARDS; LARRY RICHARDS; JACOB D. RICHARDSON; HERBERT L. RILEY; JAMES RIORDAN; SIMON J. RISK; LOUIS RIZZUTI; JOSEPH ROBINSON; MICHAEL T. ROE; THOMAS L. ROTH; JOHN ROUSSIN; ARTHUR RUEHL; ANTHONY RUSSO; DANIEL SAITZ; JOHN SALAMONE; THOMAS L. SALIBA; RONALD SANNEMAN; DANA SAUNDERS; JOHN L. SAYLOR, JR.; CHARLES SCHAEFFER; ROBERT SCHEETZ, JR.; JON S. SCHICKEDANZ; GARY A. SCHUBERT; TIMM SEITHEL; RAYMOND SHEEHAN; MICHAEL SIEMERS; SAMUEL J. SIMON; DANIEL G. SIMPHER; RICHARD SIMPHER; JOSEPH B. SIMS; TERRANCE SLOAN; RUSSELL F. SMITH; EUGENE SMITH; GWEN SPICER; CHARLES STEELE; VINCENT R. STEHLIN; PAUL E. STEINART; WILLIAM STEVENSON, JR.; DANIEL C. STEWART; PAUL STEWART; JAMES J. STIKA; DONALD STORIE; RICHARD SUZY; WILLIAM G. SWIDERSKI; GREGORY TAYBORN; JOHN TAYLOR; FRED TURNER; HER-

MAN UBBEN; GEORGE VENEGONI; MICHAEL VIERLING; DONALD VOLMERT; JAMES WALKER; JAMES WALSH; JOHN WALSH; JOSEPH E. WALSH; RUSSELL WHITENER; DWIGHT D. WIDEMAN; MICHAEL WILLIAMS; RODNEY WILLIAMS; WARREN WILLIAMS; JOHN G. WONDRACHECK; JAMES WURM; ROBERT ZAMBO, JR.; THOMAS E. ZIPF,

Appellants/Cross-Appellees,

v.

DAVID A. ROBBINS, Member of City of St. Louis Board of Police Commissioners and its acting president.; RITA M. KRAPF, Member of St. Louis Board of Police Commissioners; JAMES F. CONWAY, Member of St. Louis Board of Police Commissioners; CHARLES MISCHEAUX, Member of St. Louis Board of Police Commissioners; FREEMAN BOSLEY, JR., Member of City of St. Louis Board of Police Commissioners,

Appellees/Cross-Appellants.

Appeal and Cross-Appeal from the
United States District Court for the
Eastern District of Missouri

Submitted: May 17, 1995

Filed: September 8, 1995

Before BOWMAN, MAGILL, and LOKEN, Circuit Judges.

MAGILL, Circuit Judge

Plaintiffs appeal the district court's judgment, after a court trial, that twenty-one categories of St. Louis police sergeants are exempt from the requirements of the Fair Labor Standards Act (FLSA). Defendants, all members of the St. Louis Board of Police Commissioners (the board), cross-appeal the district court's finding that two categories of St. Louis police sergeants are partially non-exempt from the requirements of the FLSA. Because we believe that all of the St. Louis police sergeants are exempt from the FLSA, we affirm in part and reverse in part.

I. BACKGROUND

The St. Louis police department (the department) is divided into five separate bureaus. The department's basic patrol duties are the responsibility of the Bureau of Community Policing, which is divided into eight districts. The Bureau of Investigation investigates crimes throughout St. Louis. The Bureau of Patrol Support provides support functions to the districts and the Bureau of Community Policing. The Bureau of Administration provides administrative support to the department. And the Bureau of Professional Standards trains and reviews the performance of departmental personnel.

In addition to departmental divisions, there is vertical segregation between the command staff and the patrol staff of the department. The command staff includes all personnel at the rank of lieutenant and higher. Members of the command staff undertake the basic managerial duties of the department, and drive unmarked cars, wear white uniforms and do not regularly patrol the streets.

The department's patrol staff includes patrol officers, investigators and sergeants. Members of the patrol staff provide day-to-day law enforcement services to the public. Members of the patrol staff, including sergeants, patrol the streets of St. Louis, drive marked police cars and

possess standard police equipment. Investigators, including sergeants, visit crime scenes, interview witnesses, follow leads, analyze results, make arrests and aid in prosecuting criminal suspects.

Pursuant to state statute, no St. Louis police officer with the rank of sergeant or higher is allowed overtime pay.[1] In October 1988, Francis Auer, Christopher Day and James Hall, all sergeants in the department, filed suit against the department, alleging that it failed to pay them overtime wage benefits in violation of the FLSA. Additional similarly situated plaintiffs, including one lieutenant, joined the suit by filing individual consent forms. The district court granted summary judgment in favor of the police department with respect to Lt. Manual Delgado, ruling that (1) any officer of the rank of lieutenant or higher was an exempt administrator; and (2) lieutenants and sergeants were salaried, not hourly employees. At the time of trial, there were over 200 plaintiffs, all of whom were either past or present sergeants in the department.

Plaintiffs' claims proceeded to a five-day bench trial. The district court found that sixteen sergeant positions were exempt from the FLSA under the executive exemption,[2] three sergeant positions were exempt under the ad-

[1] Mo. Rev. Stat. § 84.160(4) (Supp. 1995) provides that:

> Each of the above mentioned salaries shall be payable in biweekly installments. Each officer of police and patrolman whose regular assignment requires nonuniformed attire may receive, in addition to his salary, an allowance not to exceed three hundred sixty dollars per annum payable biweekly. *No additional compensation or compensatory time off for overtime, court time, or standby court time shall be paid or allowed to any officer of the rank of sergeant or above.* (emphasis added).

[2] These sergeant positions are: precinct; detective; desk; intelligence; homicide; auto theft/fraud division; narcotics/vice division; sex crimes/child abuse; warrant/fugitive division; public afairs; mounted patrol/mobile reserve/canine unit; prisoner processing; identification section; traffic safety; academy and evidence technician unit.

ministrative exemption,[3] and one sergeant position was exempt under the combined exemption.[4] The district court aso found that two sergeant positions were partially non-exempt from the FLSA.[5] Both parties have appealed the decision of the district court.

II. DISCUSSION

As a general rule, the FLSA requires employers to pay overtime compensation to employees for hours worked in excess of a forty-hour work week. *See* 29 U.S.C. § 207 (1988). However, under the FLSA, an employer does not have to pay overtime compensation to an employee working in "a bona fide executive, administrative, or professional capacity." 29 U.S.C. § 213(a)(1) (1988). The FLSA delegates the responsibility to define these terms to the Secretary of Labor. 29 U.S.C. § 213(a)(1).

The regulations provide a "short test" and a "long test" to determine whether an employee falls under either the executive or the administrative exemption. 29 C.F.R. §§ 541.1, 541.2. Under either test, the board bears the burden of proving that the exemption applies. The "short test" applies if an employee is paid a salary of at least $250 per week. Plaintiffs stipulated that they received at least $250 per week in compensation but argue that they were not paid on a salary basis. Accordingly, the first question we address is whether the sergeants were compensated on a salary basis.

A. Salary Test

Plaintiffs argue that the district court erred in determining they are salaried employees because they may be

[3] These sergeant positions are: job performance, internal affairs and quality control sergeants.

[4] This position is the special assignments sergeant.

[5] These positions are the bomb and arson squad and the traffic safety sergeant while acting as an accident reconstruction squad sergeant.

subject to disciplinary reductions in their pay. Plaintiffs point to the testimony of Sergeant Michael Guzy that he received a two-day suspension without pay for violating the city's residence requirement.

Under the regulations, an employee is not salaried if he may receive deductions from his salary "because of variations in the quality or quantity of the work performed." *McDonnell v. Omaha, Neb.*, 999 F.2d 293, 296 (8th Cir. 1993) (quoting 29 C.F.R. § 541.118(a)),[6] *cert. denied*, 114 S. Ct. 1188 (1994). In other words, an employee is entitled to overtime compensation only if his compensation is not subject to reductions based upon the quality or quantity of the work performed. *Hurley v. Oregon*, 27 F.3d 392, 394 (9th Cir. 1994).

The mere possibility of an improper deduction in pay does not defeat an employee's salaried status. *McDonnell*, 999 F.2d at 296. In *McDonnell*, we refused to hold that fire chiefs were nonsalaried because they could be subject to a reduction in compensation if they were absent from work for less than one day unless they were able to use annual leave, sick leave or other leave with pay entitlement. *Id.* The evidence presented in *McDonnell* showed that no chief had ever received such a deduction in pay. Accordingly, under *McDonnell*, we will not hold that an employee is not salaried if there is only a contingent possibility that an improper deduction may occur.

The regulations, however, provide an exception to the rule that an employee subject to pay reductions based

[6] The Ninth Circuit held that this regulation is invalid as applied to the public sector. *Service Employees Int'l Union, Local 102 v. San Diego*, —— F.3d ——, 1994 WL 814621, at *7-8 (9th Cir. July 19, 1995), *pet. for reh'g en banc filed* (July 27, 1995). However, the Seventh Circuit holds that the regulation is valid as applied to the public sector because it is rationally related to the objectives of the FLSA. *Mueller v. Reich*, 54 F.3d 458, 442 (7th Cir. 1995). We need not address this question, however, and assume, without deciding, that the regulation validly applies to public sector employees.

on the quality or quantity of work is not salaried: "Penalties imposed in good faith for infractions of safety rules of major significance will not affect the employee's salaried status." 29 C.F.R. § 541.118(a)(5). Conversely, an employee is considered nonsalaried, and thereby entitled to overtime compensation, if his compensation is subject to reduction for a violation of any other rules. *Hurley*, 27 F.3d at 394. A safety rule of major significance includes "only those relating to the prevention of serious danger to the plant, or other employees, such as rules prohibiting smoking in explosive plants, oil refineries, and coal mines." 29 C.F.R. § 541.118(a)(5). Sergeant Guzy's violation of the department's city residency requirement is not a major safety rule under the regulation's definition. Arguably, the department's two-day pay deduction from Sergeant Guzy would require him to be treated as a nonsalaried employee.

A one-time deduction, however, does not automatically require the determination that all sergeants are nonsalaried. The regulations provide for a "window of correction" and state that "[t]he effect of making a deduction which is not permitted under these interpretations will depend upon the facts in the particular case." 29 C.F.R. § 541.118(a)(6). The regulations further state that if "a deduction not permitted by these interpretations is inadvertent, or is made for reasons other than lack of work, the exemption will not be considered to have been lost if the employer reimburses the employee for such deductions and promises to comply in the future." *Id.* In other words, "the 'window of correction' allows employers to treat otherwise eligible employees as salaried, regardless of the employer's *one-time* or unintentional failure to adhere to § 541.118(a)'s requirements." *Martin v. Malcolm Pirnie, Inc.*, 949 F.2d 611, 616 (2d Cir. 1991) (emphasis added), *cert. denied*, 113 S. Ct. 298 (1992).[7]

[7] Because the regulation is written in the disjunctive, it is not material that the deduction from Sergeant Guzy's pay was not

The "window of correction" is not available if the employer has a settled policy of making improper deductions from compensation. *Id.* Under the unique circumstances surrounding Sergeant Guzy's disciplinary loss of pay, we believe that the department made a one-time deduction, and did not make the disciplinary deduction from Sergeant Guzy pursuant to an established policy.

In 1990, Sergeant Guzy faced termination by the department for violating its city residency requirement. In lieu of possible termination, Sergeant Guzy agreed to waive his right to a hearing and accept a two-day suspension without pay. Subsequent to this incident, on June 1, 1991, the department changed its policy to provide that termination is the exclusive disciplinary sanction for violation of the residency requirement. Accordingly, the Guzy disciplinary incident was a one-time incident and can never reoccur because the department has since changed its policy. Finally, it fits within the "window of correction's" express requirement that the deduction be "for reasons other than for lack of work," because it was imposed as a disciplinary measure. Thus, we will not reverse the district court's determination that all sergeants were paid on a salary basis. In such a situation, the regulations simply require the employer to reimburse the employee for the lost wages. 29 C.F.R. § 541.118(a)(6).

B. Executive Exemption

We now address whether the district court properly concluded that (1) the executive exemption applied to fifteen categories of sergeants, thus removing them from the overtime pay requirements of the FLSA, and (2) two categories of seregants were partially exempt executives, and partially nonexempt from the FLSA. Because the sergeants were salaried employees, earning at least $250

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inadvertent, as long as it was made for reasons other than lack of work. *Lee v. Flightsafety Servs. Corp.*, 20 F.3d 428, 433 (11th Cir. 1994).

per week, this question turns on whether both prongs of the "short test" apply.[8] Under the short test, an employee is an exempt executive if the employer can show that the employee's "primary duty consists of the management of the enterprise in which the employee is employed or of a

---

[8] If the sergeants earned less than $250 per week, the board would have to satisfy a more stringent test to establish that plaintiffs were exempt as executives—the so-called "long test." The elements of the long test are:

> The term *employee employed in a bona fide executive . . . capacity* in section 13(a)(1) of the Act shall mean any employee:
>
> (a) Whose primary duty consists of the management of the enterprise in which he is employed or of a customarily recognized department of subdivision thereof; and
>
> (b) Who customarily and regularly directs the work of two or more other employees therein; and
>
> (c) Who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring or firing and as to the advancement and promotion or any other change of status of other employees will be given particular weight; and
>
> (d) Who customarily and regularly exercises discretionary powers; and
>
> (e) Who does not devote more than 20 percent, or, in the case of an employee of a retail or service establishment who does not devote as much as 40 percent, of his hours of work in the workweek to activities which are not directly and closely related to the performance of the work described in paragraphs (a) through (d) of this section: *Provided*, That this paragraph shall not apply in the case of an employee who is in sole charge of an independent establishment or a physically separated branch establishment, or who owns at least a 20-percent interest in the enterprise in which he is employed; and
>
> (f) Who is compensated for his services on a salary basis at a rate of not less than $155 per week (or $130 per week, if employed by other than the Federal Government in Puerto Rico, the Virgin Islands, or American Samoa), exclusive of board, lodging, or other facilities . . . .

29 C.F.R. § 541.1(a)-(f).

customarily recognized department or subdivision thereof, and includes the customary and regular direction of the work of two or more other employees . . . ." 29 U.S.C. § 541.1(f). Plaintiffs concede that they "regularly direct the work of two or more employees." Accordingly, resolution of this issue depends upon whether the sergeants had management as their primary duty.

We review the district court's finding of the amount of time devoted and the significance of the sergeants' managerial duties for clear eror. The district court's determination that the exemption applies is a legal determination that we review de novo. *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 714 (1986); *Shockley v. Newport News*, 997 F.2d 18, 26 (4th Cir. 1993). Plaintiffs argue that insufficient evidence exists to support the district court's finding that their primary duty was management. As a corollary to this argument, they also argue that the district court failed to make sufficient findings of fact regarding the sergeant's particular job duties. Finally, plaintiffs argue that the district court committed reversible error by concluding that the amount of time spent on managerial, as opposed to nonmanagerial, duties was irrelevant. We address the time spent on duties argument first.

Determining whether an employee's primary duty is management depends upon "all the facts in a particular case." 29 C.F.R. § 541.103. As a general rule, the regulations provide that if an employee spends over 50% of his time on managerial duties, his primary duty is management. *Id.* However, if an employee spends less than 50% of his time on managerial duties, he is not presumed to have a primary duty of nonmanagement. *Id.* In *Murray v. Stuckey's, Inc.*, we held that a finding with respect to the amount of time spent on nonmangerial job duties is not a determinative factor under the regulations when the employee spends less than 50% of his time performing managerial duties. 939 F.2d 614, 618 (8th Cir. 1991), *cert. denied*, 112 S. Ct. 970 (1922). We agree with plaintiffs that under the regulations and *Murray*, time still remains a relevant factor.

We do not read the district court's opinion as disregarding the time that plaintiffs spent on particular job duties. In determining whether plaintiffs were exempt from the provisions of the FLSA, the district court examined each sergeant category's job duties to determine its primary duty, considering four factors:

1. The relative importance of the managerial duties as compared with other types of duties;
2. The frequency with which the employee exercises discretionary powers;
3. The employee's relative freedom from supervision;
4. The relationship between the employee's salary and the wages paid to other employees for the kind of nonexempt work performed by the supervisor.

Addendum at 20. The district court's four-prong test whether a sergeant's primary duty is management if he spends less than 50% of his time performing managerial duties. *See* 29 C.F.R. §§ 541.102, 541.103; *Murray*, 939 F.2d at 618. With respect to all of the sergeant categories, the district court determined that the fourth factor—the salary factor—of the four-prong test weighed in favor of holding the sergeants' primary duty was management. The court found that in 1979, when the Missouri legislature determined it would no longer pay sergeants overtime compensation, it raised their compensation 8%. It also found that a beginning sergeant's compensation was 42% greater than a beginning turnkey officer and 34% greater than a beginning patrol officer. Accordingly, it found that all sergeants received a higher

compensation when they performed the same duties as nonexempt patrol officers and turnkey officers.

While the district court stated that "the amount of time spent conducting those duties is irrelevant in the Eighth Circuit as long as the primary duty is management," Addendum at 22, we do not take these statements to mean that the district court completely disregarded the time spent performing managerial, as opposed to nonmanagerial, duties. Rather, the district court's opinion should be construed as implicitly determining that no sergeant spent 50% of his time performing managerial duties. As such, the district court properly analyzed the sergeants' job duties under the test set forth in the regulations, and acknowledged by us in *Murray*, to determine whether an employee's primary duty is management if he spends less than 50% of his time performing managerial duties. We therefore reject plaintiffs' argument that the district court's decision must be reversed because it disregards the amount of time spent on managerial, as opposed to nonmanagerial, duties. We also reject plaintiffs' argument that the district court must be reversed because it did not make factual findings setting forth the amount of time spent performing exempt, as opposed to nonexempt, duties. We now turn to the specific sergeant positions to determine if sufficient evidence exists to determine that their primary duty is management, and they are therefore exempt as executives.

1. Precinct Sergeants

The district court made numerous factual findings with respect to precinct sergeants and concluded that managerial duties far outweigh any other duties performed by precinct sergeants and are frequently and constantly exercised. The court found that "[r]ank and file police officers look to the sergeants for guidance and direction, while senior officers rely upon them for accountability

and control of their areas and do not closely supervise their activities." Addendum at 23. The court also found that precinct sergeants do not primarily perform routine tasks like arrests and ticketing, but rather take charge of crime scenes, direct activity and ensure that their area is patrolled and secure. Additionally, the police manual provides that a precinct sergeant is responsible for: (1) supervising the officers assigned to his precinct; (2) crime prevention within his precinct; (3) inspecting his subordinate officers during roll call to ensure, among other things, that they are physically and mentally fit for duty and are properly assigned and understand their assignments; (4) taking necessary corrective action when he notices any deficiencies in his subordinates; (5) patrolling his precinct to ensure that his officers are at their proper assignments; and (6) for any reports that may be required. Appellants' App. at 40-41.

Plaintiffs do not argue that any of the district court's factual findings are clearly erroneous. However, they point out that precinct sergeants do not have authority, without a lieutenant's permission, to change the work assignments of the officers they supervise. Appellants' App. at 206. Plaintiffs also point out that a radio dispatcher assigns patrol cars to crime scenes and precinct sergeants typically have no authority to change these assignments. From this, plaintiffs argue that precinct sergeants are more akin to working supervisors, who are not exempt from the FLSA, than exempt executives. *See Shockley*, 997 F.2d at 26.

The district court correctly determined that precinct sergeants' primary duty is management. The sergeants are compensated at a higher salary range than their subordinates. The precinct sergeants' duties, as delineated in the police manual, clearly establish that managing subordinate patrol officers constitutes their primary duty. Precinct sergeants do not, as plaintiffs attempt to argue, perform identical tasks as their subordinates. Although

their duties may sometimes overlap with those of their subordinates, precinct sergeants are responsible for managing the precinct for which they are in charge. We believe the district court had sufficient grounds to conclude that the precinct sergeants had more responsibility and discretion over their subordinates than a "working foreman" does. *Id.* at 26-27. Thus, we affirm the decision that precinct sergeants are exempt executives.

2. Detective Sergeants

The district court found that a detective sergeant oversees the work of thirteen to sixteen detectives. It found that the detectives must provide their sergeant with all information concerning police matters and that all interrogations, interviews and investigatory procedures conducted by detectives are scrutinized and reviewed by a detective sergeant. The court further found that detective sergeants have discretion to ensure that the caseload is constantly moving. The court observed that although a detective sergeant may sometimes become directly involved in investigating matters, his primary duty is to manage and oversee the entire caseload and to report those results up the chain of command.

We have reviewed the record and do not believe that any of the district court's factual findings are clearly erroneous. These findings amply demonstrate that the detective sergeants' primary duty was management.

3. Desk Sergeants

The district court found that the desk sergeants basically manage the station house, overseeing incoming calls and walk-in traffic and delegating other officers to respond. It also found that the desk sergeants' responsibilities include ensuring the satisfactory performance of both civilians and officers within the station house, and they are accountable for all assets and facilities within the station and prisoners in the holdover. Area desk sergeants

must maintain the desk "book" of arrests made and other station business such as complaints filed; prisoner processing, maintenance and control; forwarding police reports and other forms and information; and training and supervising other desk and booking personnel. The court found that these sergeants have a great deal of discretion in performing their duties and are minimally supervised by their superiors.

Plaintiffs do not argue that any of the district court's factual findings are clearly erroneous; rather, they inform us that over half of a desk sergeant's day is spent answering the phones and taking walk-in complaints, which are the same duties that are performed by other police officers and civilians. Where an employee spends less than 50% of his time performing managerial duties, as noted above, time is a relevant, but not dispositive, factor. The district court's opinion found that all of the factors indicating that management is the primary duty were present: managerial duties were more important when compared with other types of duties; discretionary powers were frequently exercised by the desk sergeant; he is relatively free from supervision; and he receives higher compensation than the wages paid other employees for the same kinds of nonexempt work. Thus, we agree with the district court that desk sergeants have management as their primary duty, although they may devote less than 50% of their time to managerial duties.

4. Intelligence Sergeants

The district court noted that the intelligence unit gathers information on criminal activity within the St. Louis area. Each intelligence sergeart is assigned to one of three units containing six detectives. The court found that an intelligence sergeant's responsibilities include collecting data, preparing reports and analyses, briefing police personnel on current crime situations and supporting investigations. It also found that intelligence ser-

geants are "minimally supervised, exercise near unfettered discretion and enjoy a great deal of autonomy." Finally, it found that these sergeants' work product is evaluated for professionalism and the overall effectiveness of their respective units.

Plaintiffs do not challenge any of the district court's factual findings for clear error. These factual findings are more than sufficient to establish that the investigative sergeants' primary duty is management. We affirm the district court's decision that intelligence unit sergeants are exempt executives.

5. Homicide Sergeants

Homicide sergeants manage teams of investigators. The district court found that the homicide sergeants' primary duty is to oversee the investigations of reported killings and manage a caseload. The court found that the "hands on" investigative work performed by homicide sergeants is tangential to their primary duty.

We reject plaintiffs argument that these factual findings are not specific enough.[9] We disagree with plaintiffs' assertion that these findings do not reference homicide sergeants' specific duties; to the contrary, it appears to us that the district court found their duties to be the oversight of homicide investigations and caseload management.[10]

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[9] We note that neither side filed any motion pursuant to Rule 52(b) for the district court to amend its findings or to make any additional findings.

[10] Even assuming that the district court's factual findings were incomplete, "if the record sufficiently informs the court of the basis for the trial court's decision on the material issue, in question a remand is unnecessary." *Charles v. Allstate Ins. Co.*, 932 F.2d 1265, 1269 (8th Cir. 1991) (internal quotations and citation omitted). We may affirm a decision based upon incomplete factual findings "if there can be no genuine dispute about how the trial court actually resolved the facts missing from its express findings." *Id.* (internal quotations and citation omitted).

The evidence introduced at trial showed that homicide sergeants are in charge of the invesigation, review reports, perform evaluations on the detectives they supervise and have the authority to adjust the hours of subordinate detectives. Appellees' App. at 178-80. A homicide sergeant is evaluated on the basis of his supervisory skills, not his investigative skills. Testimony at trial indicated that a homicide sergeant's primary duty is to supervise an investigation, ensuring that evidence is collected properly, witnesses are interviewed properly, the area is canvassed properly, the correct measurements are taken where the body was located and to determine the cause of death with the medical examiner's office. *Id.* at 181. We believe this evidence is more than sufficient to support the district court's factual findings and agree that management is the primary duty of the homicide sergeants.

6. Auto Theft/Fraud Division Sergeants

The district court analogized the auto theft/fraud division sergeants to the homicide sergeants and found that their principal duty is caseload management and directing the investigations of stolen automobiles and reports of fraudulent activity. These sergeants assign cases to the officers under their command. Appellees' App. at 135. These sergeants do not carry their own caseload, and rarely write reports. *Id.* at 137. An auto theft sergeant's evaluation is based upon her managerial, not investigative, skills. *Id.* at 138. The sergeants also evaluate their officers, are expected to handle any grievances that may arise and initiate discipline if required. *Id.* at 139. We believe this evidence is sufficient to determine that the sergeants' primary duty is management.

7. Narcotics/Vice Division Detectives

The district court found that a narcotics sergeant manages eight officers and that a vice sergeant manages sixteen officers. It found that their primary duty is to

manage their respective departments, rather than directly handling cases.

Plaintiffs argue that these sergeants spend approximately three-fourths of their time on the street with their subordinates, investigating crimes and arresting criminals, and only one to two hours per day reading reports of criminal activity and reviewing criminal complaints from citizens. While on the street, however, the sergeants are supervising the work of their officers. Appellants' App. at 351. These sergeants assign cases to subordinates, do not carry their own caseload and plan operations with the captain's assistance. *Id.* at 348-50.

We do not believe that plaintiffs have demonstrated that the district court's finding of the significance of these sergeants' managerial duties is clearly erroneous. Accordingly, sufficient evidence exists to support the district court's conclusion that the executive exemption applies to the narcotics and vice sergeants.

8. Sex Crimes/Child Abuse Sergeant

The sergeant assigned to the sex crimes/child abuse unit is in charge of eight officers. The district court found that this sergeant's primary duty, similar to homicide, narcotics and vice, is to manage the unit's caseload and the officers reporting to the unit. Upon a thorough examination of plaintiffs' brief, we found no specific challenge to this particular finding, and we decline to address it further.

9. Warrant/Fugitive Division Sergeant

The district court found that the warrant/fugitive division maintains a liaison with the courts to ensure identification and arrest of persons with outstanding criminal or other violations of the law, and to recapture escaped prisoners. One sergeant acts as a court liaison for scheduling, another supervises four officers in the fugitive section,

and two sergeants supervise nine officers in the transport pool and four officers in the Fugitive Apprehension Strike Team. The court found that these sergeants' primary duty is management, although they may accompany their officers on field activities. The court found that when in the field, the sergeants exercise a great deal of management and discretion over the officers regarding how the capture or transport is organized.

Plaintiffs do not argue that any of these findings are clearly erroneous. Thus, we conclude that sufficient evidence exists to conclude that the executive exemption applies to these sergeants as well.

10. Public Affairs Sergeant

The district court made detailed factual findings regarding the public affairs sergeant. It found that ten officers report to this sergeant. The public affairs sergeant is responsible for coordinating all media, community relations and information dissemination functions. It further found that the ten officers working under the sergeant prepare the actual work product. The court determined that the sergeant's principal job is to "interact directly with command authority regarding how these publicity requirements will be conducted and then translate them into staff assignments."

Plaintiffs do not challenge any of these factual findings as clearly erroneous. Rather, they argue that approximately 80% of the sergeant's time is spent performing the same tasks as his subordinates perform. However, as noted above, time is only one relevant factor. In light of the district court's factual findings, sufficient evidence exists to establish that the public affairs sergeant falls within the executive exemption.

11. Mounted Patrol/Mobile Reserve Canine Units Sergeants

The district court found that the primary duties of the mounted patrol sergeant are duty roster preparation, scheduling, reviewing patrol officer fittings and equestrian equipment, and evaluating and appraising officer performance. The court also found that this sergeant has "fairly wide berth" to make assignments of mounted patrols in St. Louis park areas. The court found that the primary duty of the mounted patrol sergeant is to manage, coordinate and report the activities of the mounted patrol.

The court noted that the mobile reserve unit consists of officers who deal with crime in highly concentrated areas at peak times. This unit has two sergeants who are each in charge of ten officers. The court noted that although assignments are received from higher command authority, the sergeants have discretion to implement them so as to most effectively utilize their officers and resources.

The court found that the canine unit sergeants' principal duties involve oversight of operations, coordinating scheduling, assigning officer activities and ensuring proper care and handling of the animals. The court found that the sergeants "provide little in the way of direct patrol of the streets, and are accountable for all administrative and performance aspects of the unit."

Plaintiffs do not challenge any of these factual findings by the district court as clearly erroneous. These findings are sufficient to support the district court's conclusion that these sergeants are exempt executives because they indicate that the sergeants' primary duty is managerial.

12. Prisoner Processing Sergeant

The prisoner processing unit coordinates the arrest, custody, paperwork, administration and release of detained or incarcerated individuals. One sergeant serves

as Deputy Commander, with the primary responsibility of overseeing nine officers, two turnnkeys, and over eighty civilians; plaintiffs stipulate that his position is exempt. Five more sergeants serve as platoon leaders. These six sergeants' duties involve managing and overseeing the smooth operation of the unit. The court found that each sergeant has overall operational responsibility and accountability for prisoner care.

Evidence at trial indicated that the platoon sergeants prepare duty rosters and time sheets, and review arrest registers. Appellants' App. at 176. The platoon sergeant supervises and coordinates the activities of subordinates, arrest processing and release of prisoners.

We do not believe that any of the district court's factual findings are clearly erroneous. We believe these findings are more than sufficient to determine that the executive exemption applies.

13. Identification Section Sergeant

Sergeants in the identification section oversee the latent fingerprint unit and the evidence technician unit. The district court found that their principal duty is to coordinate the smooth and timely delivery of identification requests made to the unit, not to actually fingerprint people or process identification requests. Based upon our review of plaintiffs' brief, we do not believe they alleged error with respect to these findings. These findings demonstrate that the identification sergeants' primary duty is management.

14. Academy Sergeants

Two sergeants are assigned to the academy: one is in charge of basic training and the armory; the other conducts in-service training and is responsible for the Fitness Center. The district court found that five officers report to the basic training/armory sergeant and that four civil-

ians and one officer report to the in-service sergeant. The court found that the primary duties of the basic training/armory sergeant are to develop programs, create schedules, maintain records for officer basic training, and to control the armory's arms used for firearms training. The court found that the in-service sergeant's primary duty is "to implement training and fitness programs for current police personnel as implemented and managed through the civilians and officers that report to this position."

Plaintiffs do not contend that any of the factual findings concerning the in-service/fitness center sergeant are clearly erroneous. Although plaintiffs concede that the basic training/armory sergeant is primarily responsible for ensuring the smooth running of the armory, they argue he should be nonexempt because he spends over 75% of his time working as an arms expert, technician and instructor. As noted previously, the regulations do not embrace a strict temporal analysis to determine if the executive exemption applies; time is only one factor in the mix. This sergeant's managerial duties are more important than his other duties because he is responsible for the overall operation of the armory. The development of programs and schedules by this sergeant require the exercise of discretion. As noted previously, the sergeants' pay is markedly higher than a patrol officers. Based upon these factors, the district court correctly determined that the armory sergeants are exempt from the FLSA as executives.

15. Evidence Technician Unit Sergeant

The court found that the evidence technician unit is a component of the identification section. The unit is comprised of twelve specialists reporting to one sergeant. The court found that the specialists are responsible for responding to crime scenes and gathering physical and other types of evidence. The court found that the sergeant's primary duty is to act as a manager and direct the inflow of requests and for responses to crime scenes, to assign personnel within the unit, and caseload administration. Plaintiffs do not argue that any of these factual findings are erroneous. These factual findings are more than sufficient to establish that this sergeant's primary duty is management.

16. Traffic Safety Division Sergeants

The district court found that traffic safety sergeants were partially nonexempt from the FLSA for the portion of time that they worked as accident reconstruction specialists. The court noted that the unit has four sergeants who report to a lieutenant. The sergeants direct the activities of Platoons A and B, each of which contain nine patrol officers; Platoon C, the night watch platoon with two officers; and the motorcycle unit. The sergeant in charge of the motorcycle unit is also responsible for the accident reconstruction team, which has eight officers. The court found that all of the traffic safety sergeants are required to serve relief duty. Relief duty entails rotating their responsibilities and substituting for reasons of illness or vacation. The court found that the sergeants managed the respective components of the traffic safety unit and administer the diverse traffic control activities of the officers under their command.

The court found that the primary duty of sergeants when working as accident reconstruction specialists is to perform the actual work of measurement, analysis and calibration necessary to reenact vehicular accidents involving criminal charges. The court further found that this sergeant is on call on a twenty-four-hour basis, including personal and vacation time, to perform accident reconstruction work. The court found that when any sergeant was performing these duties, he was not an executive exempt from the FLSA's provisions, and entitled to overtime compensation.

The board appeals the district court's decision that these sergeants are partially nonexempt from the provisions of the FLSA. The board argues that an employee is either exempt or nonexempt from the provisions of the FLSA. We agree. The FLSA provides that "an employee employed in a bona fide executive, administrative, or administrative capacity" is exempt from its provisions. 29 U.S.C. § 213(a)(1). Furthermore, as noted above, determining whether or not an employee falls under the executive exemption requires an analysis of whether his primary duty is management. If so, the employee is exempt as an executive; if not, the employee is nonexempt and entitled to overtime compensation. This test provides an all or nothing method for determining whether an employee who performs some management and some nonmanagement job duties is entitled to overtime compensation. The parties have not cited, and we are not aware of, any case which holds that an employee is entitled to overtime compensation under the FLSA for those portions of job duties that are not exempt. Accordingly, the district court erred by determining that the traffic unit sergeants are partially exempt from the provisions of the FLSA.

Our conclusion that the regulations prevent an employee from being partially exempt as an executive is bolstered by the FLSA's explicit grant of a partial exemption to public agencies, with respect to certain law enforcement and fire protection activities. 29 U.S.C. § 207 (a)(1). Under section 7(k) of the FLSA, which is not applicable in this case, police officers are entitled to time and one-half pay only after they have worked approximately forty-three hours in a seven-day work week. *Avery v. Talladega, Ala.*, 24 F.3d 1337, 1342 (11th Cir. 1994). This section indicates that Congress will grant a partial exemption if it so desires, and we will not infer a partial exemption that appears to contradict the regulations.

The board argues that a remand is unnecessary, because it is evident from the district court's factual findings that the traffic unit sergeants' primary duty is management. We agree. The district court found that the primary duty of the traffic unit sergeants was to manage each of the component parts of traffic safety and to administer the diverse traffic control activities of the officers under their command. Plaintiffs do not challenge this finding as clearly erroneous. Furthermore, this finding is in keeping with the sergeants' duties as delineated in the police manual. The police manual lists the traffic safety sergeants' primary duty as the supervision and coordination of officers engaged in enforcing traffic regulations, providing assistance to motorists and controlling traffic. Appellees' App. at 343. Typical duties, as listed in the police manual, are: (1) supervision of officers assigned to the unit; (2) reviewing reports and arrests made by subordinate officers; (3) assigning officers as needed to direct traffic at incidents of fires, disasters and major accidents; (4) informing the public, media and other members of the department with regard to traffic ordinances and statutes; (5) preparing administrative reports; (6) making various public speaking engagements to community organizations; and (7) performing any related duties as required. *Id.*

Under these circumstances, we believe that the traffic safety sergeants' primary duty was management although the sergeant in charge of the motorcycle platoon and accident reconstruction spent some portion of his time performing nonexempt work. The traffic safety sergeants had a higher salary range than their subordinates, although their actual salary may be lower depending upon experience. Viewing the traffic safety sergeants' responsibilities as set forth in the police manual indicates that their primary duties are managerial, as the district court found. Accordingly, the traffic safety sergeants are exempt executives, and the district court erred when it determined that the sergeants were partially nonexempt for the portion

of time that they spent performing accident reconstruction work. *See Shockley*, 997 F.2d at 26-27.

17. Bomb and Arson Sergeant

The bomb and arson unit consists of one sergeant who is in charge of six officers. The district court found that the key responsibility of this unit is responding to explosive or arson threats, and investigating explosions and arson fires in coordination with other local, state or federal agencies. The district court noted that certification is required to handle explosives and that four officers in the unit, including the sergeant, are certified. The district court found that in addition to the sergeant's supervisory responsibilities, he must also directly respond to incidents. The court found that while on calls, the sergeant serves in a nonexempt capacity, and is therefore only partially exempt from the FLSA.

The board appeals the district court's determination that the bomb and arson sergeant is partially nonexempt from the FLSA when responding to calls because an employee must be either exempt or nonexempt. We previously addressed this issue with respect to the traffic safety sergeants. We hold that the district court erred in determining that the bomb and arson sergeant may be partially exempt from the FLSA for the same reasons that it erred in holding the traffic safety sergeants partially exempt, which we need not reiterate.

Again, the board argues that a remand is unnecessary because the district court found that the primary duty of the bomb and arson sergeant was management. We agree. The district court found that the bomb and arson sergeant is in charge of the six officers within the unit and, in addition to his supervisory functions, he also performs nonexempt work while on calls. The sergeant does not carry his own caseload. Appellees' App. at 137. He provides periodic training to his detectives, evaluates their performance and initiates any discipline or reward of good behavior as needed. *Id.* at 139-40. The bomb and arson sergeant spends a high percentage of his time in the office. *Id.* at 141. Accordingly, since this sergeant's primary duty was management, he is an executive exempt from the provisions of the FLSA.

C. Administrative Exemption

We now consider whether the district court properly concluded that three categories of sergeants were exempt from the provisions of the FLSA as administrators. Because the sergeants are salaried employees earning at least $250 per week, this question turns on whether both prongs of the "short test" [11] apply. Under the regulations,

[11] If the sergeants earned less than $250 per week, the board would have to satisfy a more stringent test to establish that plaintiffs were exempt as administrators. The elements of the long test are:

> The term *employee employed in a bona fide . . . administrative . . . capacity* in section 13(a)(1) of the Act shall mean any employee:
>
> (a) Whose primary duty consists of either:
>
> (1) The performance of office or nonmanual work directly related to management policies or general business operations of his employer or his employer's customers, or
>
> (2) The performance of functions in the administration of a school system, or educational establishment or institution, or of a department or subdivision thereof, in work directly related to the academic instruction or training carried on therein; and
>
> (b) Who customarily and regularly exercises discretion and independent judgment; and
>
> (c)(1) Who regularly and directly assists a proprietor, or an employee employed in a bona fide executive or administrative capacity (as such terms are defined in the regulations of this subpart), or
>
> (2) Who performs under only general supervision work along specialized or technical lines requiring special training, experience, or knowledge, or

an employee is an exempt administrator if his "primary duty consists of the performance of [office or nonmanual work directly related to management policies or general business operations of his employer], which includes work requiring the exercise of discretion and independent judgment." *Shockley*, 997 F.2d at 28 (citing 29 C.F.R. § 541.2(e)). The principles utilized in determining whether an employee's primary duty is management also apply to determine whether an employee's primary duty is administration, albeit focused on administrative rather than managerial duties. *Id.* (citing 29 C.F.R. § 541.206 (b)). In other words, under the short test, determining whether an employee is employed in an administrative capacity "requires proof either that the employee spends half his time on administrative duties or that administrative duties have special significance relative to the employee's other duties." *Id.* Administrative duties include "advising the management, planning, negotiating, representing the company, purchasing, promoting sales, and business research and control." 29 C.F.R. § 541.205(b).

The district court found that each of the three categories of sergeants claimed by the department to be exempt administrators admitted accountability for at least

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(3) Who executes under only general supervision special assignments and tasks; and

(d) Who does not devote more than 20 percent, or, in the case of an employee of a retail or service establishment who does not devote as much as 40 percent, of his hours worked in the workweek to activities which are not directly and closely related to the performance of the work described in paragraphs (a) through (c) of this section; and

(e)(1) Who is compensated for his services on a salary or fee basis at a rate of not less than $155 per week ($130 per week, if employed by other than the Federal Government in Puerto Rico, the Virgin Islands, or American Samoa), exclusive of board, lodging, or other facilities.

29 C.F.R. § 541.2(a)-(e)(1).

two or more of the administrative duties outlined in the regulations. Accordingly, in its findings of fact, the court focused only upon the primary duty of each of the separate categories. We now examine each category in turn.

1. Job Performance Section Sergeant

The court found that one sergeant manages the job performance section. The primary responsibility of the job performance section is the identification of, and provision of, counseling or other support services for employees who have administrative or duty related problems. This section provides a "first line response" for officers who may be showing signs of stress or other job related impairments. The court found that the sergeant was exempt as an administrator "due to the almost quasi-professional role that the sergeant undertakes with respect to evaluating and resolving employee problems." Addendum at 34. After examining the plaintiffs' brief, we find no specific challenge to these factual findings. These findings are more than sufficient to establish that this sergeant is exempt as an administrator.

2. Internal Affairs Division Sergeant

The Internal Affairs Division (IAD) helps maintain the department's integrity by ensuring, through investigation, that it is free of criminal conduct or other types of illegal or ethical violations. The court found that the unit is staffed with one captain, who serves as commander, fourteen sergeants and one civilian. The court found that one sergeant serves as Deputy Commander, and is mainly responsible for assigning the caseload.

The court found that sergeants were selected to staff the IAD because their experience and rank of sergeant confers a level of authority allowing their job performance to be relatively free from resistance. The court found that IAD sergeants are selected based upon their superior oral and written communication skills, with demonstrated

proficiency in comprehension of department regulations and procedures. The court further found that the captain selects officers "who can think on their feet" and upon whom he can rely for advisement. The court specifically found that IAD sergeants have more discretion than other sergeants with almost complete discretion to determine whether to proceed upon any case they receive. If the sergeant decides to proceed, he exercises independent judgment to determine the violation or charges to be filed against the offending officer. The court concluded that IAD sergeants are administratively exempt because they perform work ensuring that the department operates in accordance with its stated policy goals and objectives.

Plaintiffs do not challege any of the district court's factual findings. Rather, they argue that because the IAD sergeants actually performed investigations, they cannot be exempt as administrators. Plaintiffs refer us to *Reich v. New York*, 3 F.3d 581 (2d Cir. 1993), *cert. denied*, 114 S. Ct. 1187 (1994), in support of this argument. In *Reich*, the Second Circuit held that police officers were not exempt administrators if they were involved in "production" activities of the police department. *Id.* at 587. The *Reich* court held that conducting investigations was production work outside of the administrative exemption. *Id.* The police officers in *Reich* performed typical law enforcement activities: investigation of felonies and major misdemeanors. *Id.* at 585. The IAD sergeants, however, do not perform typical law enforcement activities; they perform internal investigations to ensure that the officers within the department are complying with its policies. Thus, *Reich* is inapposite because IAD sergeants are not involved in typical law enforcement activities.

In *Shockley*, the Fourth Circuit held that the "Ethics and Standards Leiutenant," who performed the same job duties as the IAD sergeants, was an exempt administrator. 997 F.2d at 28. The *Shockley* court relied on regulations that provide that an employee is an administrator if he

"makes analyses of data and draws conclusions which are important to the determination of . . . other policy, clearly he is dong work directly related to management policies or general business operations." *Id.* (quoting 29 C.F.R. § 541.205(c)(3)). Similar to the Ethics and Standards Lieutenant in *Shockley*, the IAD sergeants spend all of their time accumulating and analyzing data and making recommendations that shape the department's policy with respect to internal discipline. Under these circumstances, the district court correctly determined that the IAD sergeants were exempt administrators. *Shockley*, 997 F.2d at 28.

3. Quality Control Section Sergeant

The quality control section is commanded by a captain, who has three sergeants assigned to the unit. Sergeants were selected to staff the unit because they are more experienced in coordinating and managing the activity of subordinates and they are able to determine whether officers are maintaining the standards of professionalism set forth in the department's policies and procedures. The court found that the primary duty of the quality control sergeants is to ensure that department personnel are functioning in a manner consistent with department policies. Thus, the district court concluded that they were exempt as administrators.

Plaintiffs inform us that the quality control sergeants inspect the bureaus to make sure they are adequately equipped, that their books comply with the department manual, and that they then write a factual report. Plaintiffs argue that the quality control sergeants do not exercise independent judgment and discretion adequate to fall under the administrative exemption. However, evidence at trial revealed that the sergeants were in the process of (1) reviewing the duties of the job performance unit to determine if that unit can be absorbed into the quality control unit, and (2) evaluating a complaint

that the night shift staff of the Police Incident Reporting System is overworked. The sergeants who work on each study will make a recommendation on it. Appellees' App. at 231-32. This type of analysis necessarily entails the exercise of independent judgment and discretion. Accordingly, the district court correctly determined that the quality control sergeants are exempt administrators.

D. Combination Exemption

The district court determined that the special assignments sergeant was exempt from the provisions of the FLSA under a combination of the executive and administrative exemptions. However, the district court made no factual findings with respect to the amount of time this sergeant spent on nonexempt duties. The regulations allow combining the exempt work from one section to the exempt work of another section. 29 C.F.R. § 541.600 (a). Thus, an employee whose primary duty is neither management nor administration may fall under a combination exemption based upon his administrative and management responsibilities. *Shockley*, 997 F.2d at 29. "In combination exemptions, however, the employee must meet the stricter of the requirements on salary and nonexempt work." *Id.* (internal quotations and citation omitted). In other words, the employer must show that the employee falls within a combination of the long tests, and cannot rely on a combination of the short tests. This means that an employee will qualify for a combination exemption only if he does not devote more than 20% of his time to nonexempt work. 29 C.F.R. §§ 541.1(e), 541.2(d). Because the district court made no factual findings regarding the amount of time the special assignments sergeant spent on exempt and nonexempt job duties, it is impossible to determine whether or not the combination exemption applies.

We hold, however, based upon the factual findings the district court made, that the special assignments sergeant

is an exempt executive under the FLSA. The special assignments unit assists in the management and coordination of officers assigned to various federal agencies, city of St. Louis agencies, and the mayor's office. The sergeant is in charge of fifteen officers. The court found that the sergeant's primary duty is managing his subordinates, with regard to expediting essentially administrative and liaison tasks. These findings are more than sufficient to conclude that the special assignments sergeant's primary duty is management. Thus, he too is exempt from the FLSA as an executive.

III. CONCLUSION

For the foregoing reasons, the judgment of the district court is affirmed with respect to the isues raised in the appeal and reversed with respect to the issue raised in the cross-appeal.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX B

[Filed Apr. 22, 1994]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Cause No. 88-2071-C (4)

FRANCIS B. AUER, *et al.*,
Plaintiffs,

v.

ANNE MARIE CLARKE, President, St. Louis Board of Police Commissioners, etc., *et al.*,
Defendants.

FINDINGS AND CONCLUSIONS OF LAW

Plaintiff Francis Bernard Auer, one of many similarly situated[1] St. Louis police sergeants, brought suit against the St. Louis Board of Police Commissioners under the

[1] Although Federal Rule of Civil Procedure 23 generally governs class actions in federal court, that rule is not applicable to FLSA claims. The FLSA has its own class action provision contained in 29 U.S.C. § 216(b) which requires plaintiffs to "opt in" to inclusion into the class as opposed to the F.R.C.P. 23(c)(2) provision for plaintiffs to "opt out" if they want to be excluded from a damage claim. Unfortunately, the FLSA does not contain any provisions covering class certification or notice, and relies on receipt by the court of consent forms from potential class members. In view of this situation, the court allowed receipt up to trial of bona fide consent forms in order to identify parties to the instant claim and thereby satisfy the FLSA's requirement regarding payment of reasonable attorney fees and costs. Future plaintiffs who wish to join would be required to initiate an independent suit, but would be able to rely on the court's findings and conclusions contained herein.

Fair Labor Standards Act of 1938 (FLSA), as amended, 29 U.S.C. § 201 *et seq.* Plaintiff contends that defendant Anne Marie Clarke, in her official capacity as successor president of the St. Louis Police Board,[2] violated the record keeping and overtime payment requirements of the FLSA by failing to compensate alleged nonexempt police sergeants for hours worked in excess of the standard 171 hours per month.

Defendant responded that St. Louis police sergeants, by Missouri state statute and as related to their responsibilities, were exempt from the FLSA as "executive" and "administrative" employees (or some combination thereof) pursuant to 29 U.S.C. § 213(a)(1).[3] According to defendants, since 1978 St. Louis police sergeants have

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[2] On October 4, 1993, the court granted plaintiff's motion to substitute defendant Police Board presidents in recognition of the ongoing changes in composition and leadership of the St. Louis Police Board. The Court herein *sua sponte* substitutes Anne Marie Clarke for James F. Conway. Plaintiff has not, however, named the City of St. Louis or the State of Missouri as party defendants.

[3] [29 U.S.C.] § 213 *Exemptions*

(a) The provisions of section 206 (except subsection (d) in the case of paragraph (1) of this subsection) and section 207 of this title shall not apply with respect to—

(1) *any employee employed in a bona fide executive, administrative, or professional capacity* (including any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools), or in the capacity of outside salesman (as such terms are defined and delimited from time to time by regulations of the Secretary, subject to the provisions of subchapter II of chapter 5 of Title 5, except that an employee of a retail or service establishment shall not be excluded from the definition of employee employed in abona fide executive or administrative capacity because of the number of hours in his work week which he devotes to activities not directly related to the performance of executive or administrative activities, if less than 40 per centum of his hours worked in the work week are devoted to such activities) . . ." [emphasis added].

served and were always meant to serve as first level managers.

The Court denied plaintiffs and defendants' motions for summary judgment [4], and strongly encouraged the parties to settle. The parties, however, could not reach a mutually satisfactory agreement and the matter subsequently came to trial on September 15, 1993. The Court herein renders its decision.

HISTORICAL BACKGROUND

Congress enacted the Fair Labor Standards Act of 1938 as one of many remedies to the ills of the Great Depression. In order to get Americans back to work, Congress decided to fix the amount of hours in a work week and to make employers pay an overtime premium penalty for any labor performed by employees beyond an established 40 hour standard. The intended impact was to force employers to hire new workers (instead of overworking current ones) and thereby stimulate economic growth.

Over time, Congress and the courts continually interpreted coverage under the FLSA to be as fully encompassing as possible.[5] Compensation at the rate of time plus one-half times the hourly rate for hours worked in

[4] On October 30, 1991, the court granted defendants' motion for summary judgment and dismissed plaintiff Manuel Delgado finding that as a lieutenant his primary duties were managerial in nature which qualified him as an executive and therefore exempt within the meaning of the FLSA. Although the ruling was specific to Lieutenant Delgado, it was, in effect, determinative that all St. Louis police officers of the rank of lieutenant and above were exempt employees whereas their primary duty was to serve in a managerial capacity.

[5] *See, Arnold v. Ben Kanowsky*, 361 U.S. 388, 392 (1960). ("[E]xemptions are to be narrowly construed . . . and their application limited to those establishments plainly and unmistakably within their terms and spirit.")

excess of the standard 40 hours became the rule rather than the exception, and protected relatively weak and powerless workers from all forms of potential workplace abuse and exploitation.[6] Nonetheless, a key issue which arose was whether the FLSA's coverage extended to certain categories of federal, state, and local government workers.[7] In 1976, the Supreme Court decided that FLSA coverage did not include employees who worked in capacities of "traditional government functions" such as police protection, firefighting, sanitation, and mass transit, *National League of Cities v. Usery*, 426 U.S. 833 (1976). But less than 10 years later, the Supreme Court reversed itself and included these groups under the FLSA, *Garcia v. San Antonio Metropolitan Transit Authority, et al.*, 469 U.S. 528 (1985).

In the wake of the Supreme Court's ruling in *Garcia*, municipal and state governments became increasingly concerned about FLSA compensation for these groups. Due to the essential and emergency nature of the services that they provided, public health and safety employees could wield the potential for extremely powerful bargaining positions through the threat of strikes and economic holdouts. Government officials did not want to face the dire consequences that would ensue upon the public wel-

[6] *Fleming v. Hawkeye Pearl Button Company, et al.*, 113 F.2d 52, 56 (8th Cir. 1940). "The manifest declared purpose of the [FLSA] was to eradicate from interstate commerce the evils attendant upon low wages and long hours of service and industry. Accepting this as the declared purpose of the Act, exemptions would tend to defeat its purpose. The statute is remedial, with a humanitarian end in view. It is therefore entitled to a liberal construction."

[7] In 1974, Congress amended the definition of "employee" in the FLSA to include federal employees, 29 U.S.C. § 203(e). In addition, 29 U.S.C. § 216(b) which creates a private right of action for unpaid wages and liquidated damages was revised to include that "(a)ction to recover such liability may be maintained against any employer (*including a public agency*) in any Federal or State court of competent jurisdiction . . ." [emphasis added].

fare should these services be interrupted as the result of contract disputes. Nor could these officials meet the potential financial demands that would be imposed upon already strained budgets by ever increasing salaries and wages which would result from overtime payments to government workers required by *Garcia*. Consequently, a plethora of litigation was heard and reviewed by the courts in regard to the application of its holding to various public health and safety employees.

In response, Congress provided some relief in the form of special accommodations set forth in the Fair Labor Standards Amendments of 1985,[8] as well as in regulations proposed by the Department of Labor,[9] for employees who were not exempt (i.e., *nonexempt*) from receiving overtime compensation. These provisions required a certain amount of limited unpaid overtime by public safety employees to ensure that state and local governments were given a financial cushion that would enable them to afford services necessary for the public good. For example, as opposed to the normal maximum 160 hour limit set for private sector workers during a 28-day (four week) work period, firefighters were expected to work a standard 216 hours (later changed to 212 hours) and police were expected to work a standard 186 hours (later changed to 171 hours) before overtime compensation would become required. Also, unlike their private sector counterparts, government workers could be compensated

[8] 29 U.S.C. § 207(k)(a)(1), (2), and 29 U.S.C. § 207(o)(1), respectively, allowed extended pay periods for these workers prior to overtime pay provisions as well as payment in compensatory time in lieu of cash.

[9] 29 C.F.R. 541.6 provided that "separate treatment for different industries and for *different classes of employees* may be given consideration." [Emphasis added.] Additionally, the *Garcia* Court allowed a 12 month "window of opportunity" period from April 1985 to April 1986 for state and local governments to prepare for the impact of overtime pay on their budgets, and banned retroactive relief.

by time off in lieu of dollars to ensure overtime payment in a manner that eased the burden on government budgets.

But certain types of public safety employees were still *exempt* from all of the overtime compensation requirements of the FLSA. Notably, these were the people who served in executive, administrative, and professional capacities and who were compensated at greater levels for performing managerial and professional functions, as opposed to routine hourly labor. Fixed salary compensation for such exempt employees accounted for all of the work that they performed, regardless of the actual amount of hours spent to accomplish their tasks.

Many police departments are akin to military structures in their organization. Their quasi-military structure was developed to enable the police to respond effectively and rapidly to emergencies, to move quickly and decisively where force was required, and to generally set a tone of discipline and good order among the ranks. In most municipalities, police sergeants filled a role analogous to noncommissioned officers in the military ranks, having direct authority over rank and file "enlisted" type patrol officers as well as administrative, civilian and professional personnel. However, sergeants still received orders from and were directly accountable to the command authority of commissioned officers above.

Today, nuances in the amount of autonomous power that vests in sergeants varies among municipalities. Generally, larger cities rest less command power with sergeants due to a more centralized hierarchy of power within their organization structures. Smaller cities are able to allow sergeants more decentralized authority since public safety demands and total manpower are commensurately smaller and more easily managed. Basically, though, a municipality or other form of local or state government has fairly unrestricted latitude to shape and compensate a police force in a manner that satisfies its particular needs.

FLSA AND ST. LOUIS POLICE SERGEANTS

The challenge to this Court and many others has been to determine whether and when employees are eligible for overtime compensation under the FLSA. Particularly complex are court determinations of the FLSA's applicability to public safety employees against the historical backdrop of *National League of Cities* and *Garcia*. Therefore, a determination involving public safety employees' coverage under the FLSA "requires the 'drawing of lines' which in borderline cases sometimes appears arbitrary, but which nevertheless must be drawn on the basis of national policy, legislative history, and administrative practicalities as well as the particular facts of each individual case." *Batts v. Professional Building, Inc.*, 276 F. Supp. 356, 359 (1967).

A police department should be allowed to conduct its activities as free from federal government or court intervention as possible so long as it demonstrates a reasonable exercise of the discretion to appropriately manage its employees. As the St. Louis Chief of Police stated during trial, "We don't expect Sergeants to get out on the street and make arrests and issue tickets, and any of the rest of that. A Sergeant's responsibility is to manage the activity of other officers subordinate to him in rank to do those [arrest and ticket issuing] functions." [10] Notwithstanding, the Court has a duty to review the facts of this matter under the auspices of established legal standards and tests in addition to the evidence and testimony presented at trial to determine the validity of plaintiffs' claims.

Thus, this Court must review application of the FLSA to certain St. Louis Police Department sergeants for a determination of their exempt status in a manner that does no more than what is necessary to accomplish en-

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[10] Testimony of Clarence Harmon Jr., Trial Transcript at 122, September 17, 1993.

forcement of the spirit and letter of the FLSA while avoiding micromanagement of municipal activities. Because police sergeants lead "a hybrid existence" divided between both the command and patrol ranks, the Court finds it instructive that the Missouri legislature expressly and purposely approved the organizational philosophy and subsequent structure of police departments within the cities under its jurisdiction.

Within the State of Missouri the legislature has provided for distinct differences between the police department structure in Kansas City and St. Louis. The statutory overtime compensation provision for *Kansas City* states in pertinent part within the 1993 Revised Statutes of Missouri (MO. REV. STAT.):

> The chief of police, subject to the approval of the board, shall establish the total regular working hours for all police department employees, and *the board has the power, upon recommendation of the chief, to pay additional compensation for all hours of service rendered in excess of the established regular working period*, but the rate of overtime compensation shall not exceed one and one-half times the regular hourly rate of pay to which each member shall normally be entitled. No credit shall be given nor deductions made from payments for overtime for the purpose of retirement benefits.

MO. REV. STAT. § 84.510(5) (emphasis added).

In contrast, the *St. Louis* statutory provision specifically eliminates overtime compensation for the rank of sergeant and above inasmuch as it states:

> Each of the above-mentioned salaries shall be payable in biweekly installments. Each officer of police and patrolman whose regular assignment requires non-uniformed attire may receive, in addition to his salary, an allowance not to exceed three hundred

> sixty dollars per annum payable biweekly. *No additional compensation or compensatory time off for overtime, court time, or standby court time shall be paid or allowed to any officer of the rank of sergeant or above.*

Mo. Rev. Stat. § 84.160(4) (emphasis added). *See, infra,* fn. 12.

The Court assumes that Missouri's elected representatives took care and gave great contemplation when designing a St. Louis Police Department organizational structure that would best serve a particular constituency. When a federal court reviews Congressional legislation it does not lightly set aside the considered judgment of a coordinate branch. *See, Metro Broadcasting, Inc. v. FCC,* 497 U.S. 547, 605 (1990) (O'Connor dissenting). When a federal court reviews a state statutory scheme it is equally reluctant to second guess a state legislature's decisions, and even more hesitant to overturn its statutes as plaintiffs have petitioned the Court to do.[11]

Accordingly, the Court notes with deference that in May 1977, seven years prior to *Garcia,* the 79th General Assembly of the State of Missouri met and proposed to repeal and reenact certain sections of the Revised Statutes of Missouri including Mo. Rev. Stat. § 84.160 which determined compensation for St. Louis police officers. In its place, the Missouri legislature installed Mo. Rev.

[11] In their second amended complaint plaintiffs stated, "RsMO [sic] Section 84.160(5) is unconstitutional in that it violates Article 6, clause 2 of the United States Constitution wherein the U.S. Constitution and the Laws of the United States shall be the Supreme Law of the land. More particularly, the State cannot enact a law exempting Sergeants from overtime compensation contrary to the provisions of the FLSA." Plaintiffs' sixth prayer for relief was to "[d]eclare RsMO [sic] Section 84.160 unconstitutional."

Stat. § 84.160.1,[12] and § 84.160.7.[13] These statutes became the law in Missouri by 1979 and remained intact until 1992 when the Missouri legislature replaced Mo. Rev. Stat. § 84.160.7 with Mo. Rev. Stat. § 84.160.3,[14], but nonetheless continued to expressly ban overtime compensation for St. Louis police sergeants. In 1993, the relevant statutory authority became Mo. Rev. Stat. § 84.160.4 but the language remained identical to the 1992 language.

The Court found no dispositive evidence of legislative intent with regard to whether the 1979 eight per cent salary increase for St. Louis police sergeants was meant to confer managerial responsibilities upon them. The legislative record only indicates that the increase was meant to compensate sergeants for overtime pay that they would no longer receive. However, there is a strong inference that a sergeant's level of authority and commensurate compensation was legislatively and professionally meant to be markedly different from that of rank and file officers.

For example, in 1993, the Missouri legislature set sergeants' beginning salaries at $39,192 through June, 1994,

[12] Mo. Rev. Stat. § 84.160.1: [E]ach sergeant who has served in the rank of sergeant for six years or more shall receive . . . seventeen thousand seven hundred and forty dollars per annum; each sergeant during the first five years that [s]he serves in the rank of sergeant shall receive . . . seventeen thousand one hundred ninety four dollars per annum. *Laws of Missouri,* H.C.S.S.C.S. Senate Bill No. 508, pp. 227-233, Adopted March 23, 1978.

[13] Mo. Rev. Stat. § 84.160.7: *In lieu of compensatory time off or payments for overtime hours,* all commissioned officers of the rank of . . . *sergeant and above* shall receive an additional eight percent of the compensation established in Subsection 1 . . . including the chief of police [emphasis added]. *Id.*

[14] Mo. Rev. Stat. § 84.160.3: "No additional compensation or compensatory time off for overtime, court time, or standby court time shall be paid or allowed to any officer of the *rank of sergeant* or above." [Emphasis added.]

which is $16,360 (42%) greater than the lowest ranked new Turnkey Officer who earns $22,832; and $13,388 (34%) greater than a starting Patrol Officer who earns $25,804. Notably, over a one year period, a newly hired St. Louis police Turnkey would need to generate over 80 hours of overtime per month, and a freshmen St. Louis Patrol Officer would need to generate nearly 60 hours of overtime per month, in order to close the salary gap between either position, respectively, and that of a starting St. Louis Police Sergeant.[15]

In response to the Court's inquiry during oral arguments conducted on December 10, 1993, plaintiffs' counsel responded that patrol officers who seek a promotion to the rank of sergeant must enter into a "highly competitive" quest. They must make a conscious decision to forsake the potential for routine overtime pay.[16] They must work and study hard on their own time and beyond their routine duties to prepare for and successfully complete a battery of difficult examinations. They must patiently wait for promotional opportunities to arise as rotational openings for sergeants positions are only periodically posted. And they are keenly aware that with extremely rare exception any future career opportunities for senior command must be preceded by a tour of duty as a sergeant.

[15] The court obtained these data from the salary matrix charts contained in MO. REV. STAT. § 84.160.2 (1993). Annualizing the required 171 hours per month yields 2,052 hours per year. By dividing each respective salary by these total annual required hours, it is derived that a new Turnkey earns $11.13 per hour regular time and $16.70 overtime pay (i.e., 1.5 x $11.13). Conjointly, a new Patrol Officer earns $12.58 per hour regular pay and $18.87 per hour overtime (i.e., 1.5 x $12.58). The final calculation simply involves dividing the difference in pay between each respective position and that of a beginning Sergeant by the overtime rate:

A. *Turnkey*: $16,360/$16.70 = 980 annual overtime hours
= 82 monthly overtime hours

B. *Patrol*: $13,388/$18.87 = 709 annual overtime hours
= 59 monthly overtime hours

The court would find it unnecessary to comment upon the compensation gap between sergeants and patrol personnel except that plaintiffs have made considerable mulch of the circumstance that patrol officers may in some instances earn more than sergeants. To achieve this result, a Patrol Officer would usually need to be extremely senior or work the near equivalent of one and one-half jobs. For example, utilizing the same above calculations, a five year veteran Patrol Officer would need to perform 25 hours per month of overtime to equal a beginning Sergeant's pay, and a 10 year veteran would need to work at least 20 monthly overtime hours. Thus, in the case of very junior police officers, the amount of overtime required to "catch up" with a Sergeant's pay would likely be unfeasible, impracticable, and disallowed.

It must be recognized, then, that a dual career path exists within the St. Louis Police Department. A police officer is free to choose to remain on the beat with little managerial or supervisory responsibility but with an increase in the potential for obtaining more overtime pay opportunities. Alternatively, a police officer may choose to pursue command career opportunities which must necessarily entail serving a tour of duty as a sergeant. However, upon achieving the rank of sergeant, limitations will arise with respect to the amount and type of overtime or other opportunities that will exist for a police officer to generate additional income. Apparently, the tradeoff was meant by the Missouri legislature to be addressed by a significant increase in salary.

APPLICATION OF THE FLSA

The first issue the Court must address is the semantic conflict over the interchangeability between supervision and management. Plaintiffs concede that supervisory functions are part of management, but caution that super-

[16] Sergeants may, however, generate additional income through government grants as well as through approved outside employment in such areas as security and personal protection.

vision is not equivalent to management. Plaintiffs thereafter rely heavily upon the characterization of police sergeants as "working supervisors" who stand side by side with patrol officers conducting the same routine activities with the mere additional responsibility of occasionally showing officers how particular tasks are completed. As working supervisors sergeants are meant to and, in fact, are doing the same thing as officers subordinate to them. Following this logic plaintiffs urge the Court to conclude that sergeants should receive overtime pay since they are basically doing the same things as patrol officers.

Defendants submit that if there is any relevant distinction between management and supervision, it is a distinction with only trivial import to the instant matter. Alternatively, defendants cite numerous examples of sergeants' lack of statistical productivity [17] as a benchmark measure that a sergeant's primary duty is to manage, which is a role incompatible with achieving statistical laurels. Defendants contend that since a sergeant's performance is measured not by the amount of patrol type statistics he or she directly compiles, but rather by the amount of productivity that is generated by the officers who report to them, a sergeant's poor statistical performance may well be a leading indicator of the predominance of his or her role as a manager.

Management is not supervision. Management does encompass supervision. In their customary usage, the ultimate reconciliation between the two is one of the *degree* of control, authority, and autonomy exercised by the person in charge to basically get subordinates to accomplish the tasks which achieve the goals that make organiza-

[17] Defendants submitted Exhibits AA through GG, St. Louis Police Department Commission Activity Report from 1987 through 1993, to show the disparity of performance in routine patrol type activities (e.g., number of arrests, traffic violation citations) between sergeants and patrol officers.

tional productivity optimally successful. The Eighth Circuit's holding in *Murray v. Stuckey*, 939 F.2d 614 (8th Cir. 1991), is dispositive on this matter. Absent and even despite a showing of the amount of time spent on exercising particular responsibilities, the sum total of the type of responsibilities exercised and the degree of autonomy, discretion, and independent judgment allowed in exercising them is the linchpin for determining whether an employee is performing in a managerial capacity.[18]

Rank, title, or position descriptions, *per se*, or the amount of time spent expediting particular tasks or duties are not dispositive indicia of management. *Id.* at 618. What the person is intended to do and whether the person is actually doing it "based on all the facts in a particular case," *id.*, is what constitutes primary duty. In order to reach a determination of managership as primary duty, this Court must apply the four benchmark measures relied upon by the Eighth Circuit in *Stuckey's*, as set forth in C.F.R. § 541.103 and cited by both parties, which are:

1. The relative importance of the managerial duties as compared with other types of duties;
2. The frequency with which the employee exercises discretionary powers;
3. The employee's relative freedom from supervision;
4. The relationship between the employee's salary and the wages paid to other employees for the kind of nonexempt work performed by the supervisor.

[18] Conducting an entire orchestra is managerial. The maestro must coodinate all sections and particular instruments within sections to successfully accomplish playing the score. Among the conductor's managerial responsibilities lie supervisory tasks. For example, showing the string section how its part fits into the arrangement is supervisory. Appraising a soloist's performance would be supervisory.

Defendant Police Board acknowledged that it carried the burden of proof when claiming exemption from the FLSA's overtime and record keeping requirements. The parties agreed that in light of application of the "short test," the principal issue to be settled was whether the primary duty of St. Louis police sergeants is management.[19] The parties subsequently stipulated to 20 executive positions, three administrative positions, and one "combined" position—a total of 24 positions [20]—as those meriting review. The Court reviewed all disputed police sergeant positions against the primary duty test delineated in the four standards set forth in 29 C.F.R. § 541.103. The Court also considered each of these positions against the *Stuckey's* criteria as well as the totality of evidence and testimony presented at trial. Accordingly, the Court found plaintiff's argument persuasive in only two St. Louis Police Department sergeant positions which it found to be partially nonexempt from the overtime pay and record keeping requirements of the FLSA.

A. Executive Exemptions

"An employee may qualify for the executive exemption if the employee meets both the 'duties' and salary requirements set forth in 29 C.F.R. § 541.1 (a)-(f)." *McDonnel v. City of Omaha*, slip op. No. 92-3073 (8th Cir. 1993). The regulation gives examples of duties considered managerial which include training others; appraising employee performance, productivity and efficiency; recommending changes in job status; maintaining records;

[19] With respect to plaintiff sergeants, the court upheld the application of the "short test", 29 C.F.R. § 541.1(f), to assess their claims inasmuch as all plaintiff sergeants (a) earned over $250 per week, (b) were responsible for the work of two or more employees, and (c) questioned whether their primary duty was management.

[20] *See, infra*, fn. 21 and Joint Stipulation of Uncontested Facts at 3-4.

setting hours; apportioning work; handling grievances; and meting out discipline when necessary.

During trial, all sergeants now declared by the Court to fill exempt executive positions admitted accountability for at least two or more of these duties as they pertained to their job descriptions and their work activity. Inasmuch as all sergeants exempt under the FLSA's executive provision therefore performed some managerial duties, and the amount of time spent conducting those duties is irrelevant in the Eighth Circuit as long as the primary duty is management, the Court focused solely upon examining the primary duty of each disputed position in order to reach the following findings and conclusions:

1. *Precinct Sergeants* (Exempt)

Captains are in command of districts. Lieutenants command platoons within these various districts. Sergeants command the precincts within these platoons. According to testimony, about 120 precinct sergeants are currently employed in the St. Louis Police Department. Each precinct within the three Area Stations [21] requires daily patrol, and the sergeant must be aware of all activity that occurs within his precinct. The primary duty of the sergeants is to oversee the activity of patrol officers assigned to his platoon. They must demonstrate management, direction and the ability to coordinate activities of their subordinates and oversee their subordinates' conduct for proper interpretation and implementation of the rules and regulations.

Furthermore, precinct sergeants have a clear area of autonomy to move cars and personnel in a manner that optimally maintaains area safety. They are not primarily

[21] Previously there were nine different district stations; each district had its own separate building and station. Recently, the department has reorganized to an area station concept. (Trial transcript 9/15 at p. 93.)

performing routine tasks like arrests and ticketing. Instead, the precinct sergeants are required to take charge of crime scenes, direct activity, and ensure that their area is patrolled and secure. Precinct sergeants are required to participate in roll call to maintain order and decorum among the patrol troops and perform other duties which may add extra time to their shift. They may also have to remain on duty until all precinct officers are dismissed. However, such additional time is an essential part of a sergeant's leadership role and responsibilities. Rank and file patrol officers look to the sergeants for guidance and direction, while senior officers rely upon them for accountability and control of their areas and do not closely supervise their activities. Managerial duties far outweigh any others and are frequently and constantly exercised. As the Court has reviewed earlier, the salary differential to compensate precinct sergeants is markedly larger than their subordinates.

2. *Detective Sergeants* (Exempt)

In each of the three Area Stations a sergeant is assigned to its respective Detective Bureau to oversee the work of 13 to 16 detectives. Each of these sergeants reports to a lieutenant. Their principal duty is to manage the workload of detectives who report to them. Detectives who report to these sergeants must provide them with all information concerning police matters which comes to their attention. All interrogations, interviews and investigatory procedures conducted by detectives are subject to close scrutiny and review by the sergeants. These sergenats maintain a significant amount of latitude to ensure that the caseload is constantly moving. Although they may become directly involved in investigative matters, thier primary duty is to manage and oversee the entire caseload, and to report those results upward.

3. *Desk Sergeants* (Exempt)

The desk sergeant basically oversees the influx of calls and walk-in traffic and delegates others to respond. The desk sergeants' responsibilities include ensuring the satisfactory performance of both civilians and officers within the station house and they are accountable for ail assets and facilities within the station and prisoners in the hold-over. Area desk sergeants are in charge of all station operations. These include maintaining the desk "book" of arrests made and other station business such as complaints filed; prisoner processing, maintenance and control; forwarding police reports and other required forms and information; and training and guidance of other desk and booking personnel. These sergeants have a great deal of latitude in the authority and ongoing discretion that they must exercise to ensure that the station house operates according to procedures. The diverse nature of the type of situations which may arise and to which they must respond makes it necessary for them to exercise independent judgment and decision making to resolve these situations. Lieutenants do not look over their shoulders to make sure they are doing their job; they rely on them to handle situations and call them if there is a situation which needs approval from higher authority or may involve questions of law or policy. However, desk sergeants are free to manage their stations in the manner they see fit to get the job done with a minimum of supervision from above.

4. *Intelligence Sergeants* (Exempt)

This is an investigative unit that is responsible for gathering information on criminal activity within the St. Louis area. One sergeant is assigned to a gang crime unit, and two others are assigned to six-member detective teams. They collect data, prepare reports and analyses, brief police personnel on current crime situations, and also support investigations. Their work product is judged

on professionalism and effectiveness. They are minimally supervised, exercise near unfettered discretion, and enjoy a great deal of autonomy.

5. *Homicide Sergeants* (Exempt)

Homicide consists of eight sergeants who supervise teams of investigators. The principal charge of these sergeants is to oversee the investigations of reported killings. The primary duty of homicide sergeants is to manage a caseload and oversee investigation activity. Although they must perform some "hands on" investigative work, it is tangential to their principal charges.

6. *Auto Theft/Fraud Division* (Exempt)

Although sergeants assigned to this Crimes Against Property Unit may participate in investigations, the Court agrees with defendant that their principal duty is, like homicide, to manage the caseload and direct investigations of stolen autos and reports of fraudulent activity.

7. Narcotics/Vice Divisions (Exempt)[22]

The vice unit consists of a sergeant who manages eight officers, and the narcotics sergeant manages 16 officers. Again the primary duty of these sergeants is to manage each respective department as opposed to directly handling cases.

8. *Sex Crimes/Child Abuse* (Exempt)

Like homicide, narcotics, and vice, the sergeant's primary duty is to manage the unit workload and the eight officers who report to the unit.

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[22] For brevity, the Court has consolidated Narcotics and Vice categories as well as Mounted Patrol, Mobile Reserve and Canine Units. The Court has also isolated the Accident Reconstruction component of the Traffic Safety Division due to its highly specialized nature.

9. *Warrant/Fugitive Division* (Exempt)

The purpose of this unit is to maintain a liaison with the courts so as to ensure identification and arrest of persons with outstanding criminal or other violations of the law, and to recapture escaped prisoners. Ten officers are assigned to the unit to provide this law enforcement function. One sergeant acts as court liaison for scheduling. Another supervises the Fugitive section and has four officers who report to this position. Two other sergeants supervise the transport pool (nine officers reporting) and the Fugitive Apprehension Strike Team (FAST, four officers reporting). These sergeants' primary duty is management of this Division, although they may accompany their personnel on field activities. Even if they do go into the field, they exercise a great deal of management and discretion over those who report to them regarding how the capture or the transport will be organized.

10. *Public Affairs* (Exempt)

The public affairs sergeant is the deputy commander of the unit and is responsible for coordinating all media, community relations, and information dissemination functions. The staff of 10 officers reporting to the sergeant prepare the actual work product which the sergeant supervises. The sergeant's principal job is to interact directly with command authority regarding how these publicity requirements will be conducted and then translate them into staff assignments. As such, the sergeant serves primarily as a manager.

11. *Mounted Patrol/Mobile Reserve/Canine Units* (Exempt)

The primary purpose of the Mounted Patrol Unit is to patrol certain assigned and designated areas on horseback to ensure public safety. The typical duties of the sergeant in the unit are duty roster preparation, scheduling, reviewing patrol officer fittings and equestrian equipment,

and evaluating and appraising officer performance. The sergeant rarely directly partols areas on horseback. Instead, the sergeant uses a vehicle to cover as wide an area as possible to effectively oversee horseback operations. The unit is authorized for manpower of up to 10 officers who report to the sergeant who serves as the unit commander. The sergeant has fairly wide berth to make assignments of mounted patrols in various park areas of St. Louis. Decisions made by the sergeant are normally communicated to superior officers informationally as opposed to seeking permission. The primary duty of the sergeant in this unit is to manage, coordinate, and report the activities of the mounted patrol.

Mobile Reserve serves primarily as a force comprised of officers who deal with crime in highly concentrated areas at peak times. As such they usually work in the evening and late night hours, and each day they may have a different patrol assignment or function. The two sergeants in charge of Mobile Reserve have 10 officers reporting to each of them. The primary duty of these sergeants is to manage and coordinate the activities of the squads. Although assignment directives are received from above, these sergeants have latitude to implement them in a manner that they see is most effective utilizing the personnel and resources at their disposal.

The Canine Unit includes a street patrol function, a training and maintenance function, and a civilian who serves in a custodial capacity. One sergeant is in charge of all canine street operations, and another sergeant serves over the Training Center. A total of 15 officers are rotated throughout various duties on the street or in the Training Center. The principal duties of either sergeant involve overseeing operations, coordinating scheduling, assigning officer activities, and ensuring proper care and handling of the animals. The sergeants provide little in the way of direct patrol of the streets, and are accountable for all administrative and performance aspects

of the unit. The primary duty of these sergeants is management of the Canine Unit.

12. *Prisoner Processing* (Exempt)

Prisoner processing entails coordinating the arrest, custody, paperwork admininstration, and release of detained or incarcerated individuals. The division serves under the Bureau of Patrol Services. The sergeant serves as Deputy Commander of Prisoner Processing with the primary responsibility of overseeing the activities of nine officers, two turnkeys, and over 80 civilians. Five additional sergeants serve as platoon leaders over three eight-hour rotating shifts. In short, six sergeant work in Prisoner Processing with the express duties of managing and overseeing the smooth operation of the division. The primary duty of all of the sergeants is to manage the three shifts with overall operational responsibilities and accountability for prisoner care.

13. *Identification Section* (Exempt)

The Identification Unit is responsible for fingerprint processing, coordination, and identification. A civilian is in overall change of the unit, and a sergeant serves as Deputy Commander. Reporting directly to the Deputy Commander sergeant are three civilians and three officers who staff the Latent Fingerprint Unit. The Identification Unit, however, also employs a total complement of over 35 civilians and officers, including Evidence Technicians. The Evidence Technician Unit similarly reports to a sergeant, and consists of 12 sergeant specialists. The primary duty of both sergeants who oversee the Latent Fingerprint Unit and Evidence Technician Unit is management of each respective area. Their principal charge is not to actually fingerprint people or process identification requests, but to coordinate the smooth and timely delivery of such requests made to these units.

14. *Traffic Safety Division* (Partial Nonexempt)

The Traffic Safety Division is tasked with the enforcement of traffic regulations, providing motorist assistance, and traffic control. The Traffic Safety Division is under the command of a lieutenant. Four sergeants report to the lieutenant and direct the activities of its various components. These components include Platoons A and B which contain nine patrol officers each. Platoon C is the night watch platoon and contains only two officers. A third component is the motorcycle unit which serves under the same sergeant who is responsible for the Accident Reconstruction Team. Eight officers report to this component of Traffic Safety. Four of these officers are assigned to the grant for the Motor Carrier Safety Assistance Program (MCSAP).

All sergeants within Traffic Safety are required to serve relief duty. They must be able to rotate among responsibilities and substitute for reasons of illness or vacation. The primary duty of these sergeants is to manage each of the component parts of Traffic Safety. These duties are primarily managerial. The primary duty of these sergeants is to administer the multifarious traffic control activities of the officers under their command.

However, a Traffic Safety sergeant, while serving in the capacity of an accident reconstruction specialist as a primary duty, is nonexempt from the FLSA's requirements. The primary duty of this position is not management but performining the actual work of measurement, analysis and calibration necessary to reenact vehicle accidents that involve criminal charges. This individual may be called on a 24 hour basis, even on his/her personal time or vacation time, to perform these duties, and must be subject to the FLSA's overtime and record keeping requirements.

15. *Academy* (Exempt)

Two sergeants are assigned to the Academy. One sergeant is in charge of basic training and the Armory. The other sergeant conducts in-service training and is also responsible for the Fitness Center. Five officers report to the basic training/armory sergeant, and four civilians and one officer report to the In-Service sergeant. The major responsibilities of the basic training/armory sergeant are to develop programs, schedules, and maintain records for officer basic training, and to control the arms used for firearm training from the Armory. The primary duty of this sergeant is to implement these training programs through the officers below, a management function. Similarly, the in-service/fitness center sergeant's primary duty is to implement training and fitness programs for current police personnel as implemented and managed through the civilians and officers that report to this position.

16. *Evidence Technician Unit* (Exempt)

This unit is a component part of the Identification section. Reporting to one sergeant are 12 specialists who are responsible for responding to crime scenes and gathering physical and other types of evidence. The sergeant's primary duty as a manager is to direct the inflow of requests and for responses to crime scenes to assign personnel within the unit as well as the caseload administration.

17. *Bomb and Arson* (Partial Nonexempt)

A sergeant is in charge of six officers within the Bomb and Arson Unit. The key responsibility of this unit is to respond to calls of explosive or arson threats, and to investigate explosions and arson fires in coordination with other local, state, or federal agencies. In order to handle explosives, certification is required, and four people within the unit, including the sergeant, are certified. In addition to the sergeant's supervisory responsibilities, direct re-

sponse to incidents is required. While on these calls, the sergeant serves in a nonexempt capacity, and is subject to the overtime pay and record keeping requirements of the FLSA.

B. Administrative Exemptions

The analysis used to determine whether an employee's primary duty is administration is set forth in 29 C.F.R. § 541.206(b). An employee satisfies the short test for administrative employment if the employee's primary duty consists of performing office or nonmanual work directly related to management policies or general business operations, and includes work requiring the exercise of discretion and independent judgment. *Id.*, § 541.2(a)-(1). Administrative duties entail "work performed by so-called white collar employees engaged in . . . advising the management, planning, negotiating, representing, . . . purchasing, promoting, research and control." *Id.*, § 541.205(b).

Upon review of each disputed administrative position, the Court found during trial that all sergeants now declared by the Court to fill exempt administrative positions admitted accountability for at least two or more of these administrative duties as they pertained to their job descriptions and their work activity. Inasmuch as all sergeants exempt under the FLSA's administrative provision therefore performed some managerial duties, and the amount of time spent conducting those duties is irrelevant in the Eighth Circuit as long as the primary duty is management, the Court focused solely upon examining the primary duty of each disputed position in order to reach the following findings and conclusions.

1. *Job Performance Section* (Exempt)

Job Performance has as its primary responsibility identification of and providing counseling or other support services for those employees who have either administrative problems or duty related problems. Examples of the type of counseling problems that may be handled are officers who are involved in vehicular accidents, assaults, or arrest resists. It is a first line response for individuals who may be showing signs of stress or other job related impairments. One sergeant manages this unit which is administratively exempt due to the almost quasi-professional role that the sergeant undertakes with respect to evaluating and resolving employee problems.

2. *Internal Affairs Division* (Exempt)

The Internal Affairs Division (IAD) is charged with the responsibility of maintaining the integrity of the Police Department by ensuring through investigation that the department is free of criminal conduct and other types of legal or ethical violations. The IAD therefore investigates matters concerning Department employees who have been charged with or are suspected of procedural or criminal violations. The Division is comprised of one captain who serves as Commander, 14 sergeants, and one civilian. One sergeant serves as Deputy Commander of Internal Affairs and is mainly responsible for assigning the caseload.

Sergeants were selected to staff the IAD because of their experience and because the rank of sergeant confers a level of authority that enables them to perform their jobs relatively free from resistance. IAD sergeants are also selected because of their superior oral and written communication skills. They have demonstrated proficiency in their comprehension of Department regulations and procedures. The captain selects officers who can "think on their feet" and on whom he can rely for advisement.

IAD sergeants have more discretion than other sergeants. When they receive a case they have nearly complete discretion to decide whether or not to proceed on a complaint. Once the officer decides to proceed, he or she exercises independent judgment to determine the violation or charges to be filed against the offering officer.

Since IAD sergeants perform work that ensures that the department operates in accordance with stated policy goals and objectives, they are administratively exempt.

3. *Quality Control Section* (Exempt)

Quality Control, a relatively new section, is commanded by a Captain and three sergeants assigned to the unit. The rank of sergeant was selected to fill the three positions because sergeants were more experienced in coordinating and managing the activity of subordinates and for their ability to interpret whether or not officers are maintaining the standards of professionalism set forth in Department policies and procedures. The primary duty of the Quality Control sergeants is administrative in that they ensure that Department personnel are functioning in a manner consistent with Department policies.

C. Combination Exemptions

1. *Special Assignments* (Exempt)

Special Assignments was designed to assist in the management and coordination of officers assigned to various federal agencies, City of St. Louis agencies (e.g., Circuit Attorney's office), and the Mayor's office. It is comprised of 15 people, all of whom report to one sergeant. The primary duty of this sergeant is to manage the people below, but in regard to expediting essentially administrative and liaison tasks.

CONSTITUTIONAL CONFORMANCE

The Court finds plaintiffs' contentions that Mo. Rev. Stat. § 84.160 and specifically Mo. Rev. Stat. § 84.160 (5) should be preempted by the FLSA without merit. St. Louis police sergeants' primary duties fall within the executive and administartive exemptions set forth in 29 U.S.C. § 213 (a)(1). Where the Court has found exception to these FLSA exemptions, overtime relief is granted only when those sergeants are acting in the capacity of a nonexempt employee.

The primary duty of a Traffic Safety Division sergeant is to manage a unit within that division. However, that sergeant may be required to perform as an accident reconstruction specialist when called. The primary duty of the Bomb and Arson sergeant is to manage that Unit. However, due to the need for certification when responding to a threat call, that sergeant may be required to perform in the capacity of a nonexempt employee under those specific circumstances. Because such incident calls may be documented and logged with specificity, they may conform to the overtime and record keeping requirements of the FLSA.

When sergeants are acting in these nonexempt capacities, they must maintain a written record of their activity. Should such calls occur outside of their routine working schedule, overtime compensation is deserved. A log for such incident calls that occur within the sergeant's routine working schedule will also be maintained so that the sum total of those hours will be paid in addition to the sergeant's exempt salary. Payment may be received in cash, compensatory time, or some combination thereof,[23] but at the rate of a similarly situated nonexempt person, which is one and one-half times the nonexempt rate, when the sum total of these hours are in excess of the 171 hours allowed by the FLSA.

SO ORDERED.

Dated this 22nd day of April, 1994.

/s/ Clyde S. Cahill
CLYDE S. CAHILL
United States District Judge

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[23] Payment is to be made pursuant to Mo. Rev. Stat. § 84.160(7) which conforms to 29 U.S.C. § 207(o)(1), (2), and (3), and allows "compensation for authorized overtime . . . whenever the total accumulated time exceeds 40 hours. The accumulated 40 hours shall be taken as *compensatory time off* at the officer's discretion with approval of his supervisor." (Emphasis added.)

APPENDIX C

[Filed Apr. 22, 1994]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Cause No. 88-2071-C (4)

FRANCIS B. AUER, *et al.*,
Plaintiffs,

v.

ANNE MARIE CLARKE, President,
St. Louis Board of Police
Commissioners, etc., *et al.*,
Defendants.

ORDER

IT IS HEREBY ORDERED that judgment is entered in favor of the defendants as to all plaintiffs except for those particular sergeants assigned to the Bomb and Arson Squad and the Accident Reconstruction Squad who are designated in this order as partial nonexempt employees.

IT IS FURTHER ORDERED that the following categories of St. Louis Police Department Sergeants are exempt from the overtime provisions of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201, *et seq.*: Precinct Sergeants; Detective Sergeants; Desk Sergeants; Intelligence Sergeants; Homicide Sergeants; Auto Theft/Fraud Division Sergeants; Narcotics Sergeants; Vice Sergeants; Crimes Against Persons Sergeants; Warrant/Fugitive Sergeants; Public Affairs Sergeants; Mounted Police Sergeants; Mobile Reserve Sergeants; Canine Unit Sergeants; Prisoner Processing Sergeants; Identification Section Sergeants; Traffic Safety Division Sergeants; Academy Sergeants; Evidence Technician Sergeant; Job Performance Sergeants; Internal Affairs Sergeants; Quality Control Sergeants and Special Assignment Sergeants, unless otherwise eligible as defined in the judgment of this Court.

IT IS FURTHER ORDERED that the following categories of St. Louis Police Department Sergeants are nonexempt: Bomb and Arson Sergeants and Accident Reconstruction Sergeants, and are therefore eligible for the benefit of overtime as herein defined and described.

IT IS FURTHER ORDERED that the issue of damages shall be presented to a magistrate or hearing officer to be appointed by the Court. The magistrate or hearing officer may adduce testimony and accept evidence on the issue of damages and submit recommendation to this Court for review.

Inasmuch as all other sergeants are considered exempt, none of them are entitled to overtime pay for work previously concluded. However, the Court does not wish by this Order to encourage actions by the defendant Board members or command staff which would treat exempt sergeants unfairly by permitting excessive utilization of sergeants in nonexempt functions. Merely labeling a sergeant as exempt should not deprive him of compensation for excessive, repetitive, or continuous nonexempt duties. Accordingly, the following procedures are to be followed prospectively or in the future.

If any sergeant believes the performance of duties of a nonexempt nature (e.g., patrolman duties of arrests and investigations) have been required which culminate in egregious overtime because performance of these duties has been *continuous, repetitive,* and/or for an *excessive* amount of time, the sergeant may file a claim for overtime. If these circumstances occur, as enunciated herein, those sergeants may fall within the protection of the FLSA and may be entitled to overtime compensation.

If, in the future, a sergeant believes that entitlement to overtime compensation is due because the requirements of continuous, repetitive, and excessive demands have been required for nonexempt activities, the sergeant may file a motion before this Court seeking such compensation. The claims, in the form of pretrial motions, must be filed in writing within one year of the nonexempt duty and must provide specific details as to when the nonexempt duties occurred, the nature and extent of those duties, and the person(s) who directed such duties. The Court, by this Order, hopes that such continuous, repetitive, and excessive nonexempt duties will rarely occur. If, however, these specific conditions do occur, those sergeants will be eligible for the appropriate overtime compensation.

SO ORDERED.

Dated this 22nd day of April, 1994.

/s/ Clyde S. Cahill
CLYDE S. CAHILL
United States District Judge

APPENDIX D

[Filed Aug. 26, 1994]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Cause No. 88-2071-C (4)

FRANCIS BERNARD AUER, *et al.*,
Plaintiffs,

v.

ANNE MARIE CLARKE, *et al.*,
Defendants.

ORDER AND
ENTRY OF FINAL JUDGMENT

In accordance with the evidence adduced at trial and the stipulation agreed to by the parties (a copy of which is attached hereto), judgment is entered in favor of plaintiffs for those particular St. Louis police sergeants assigned to the Bomb and Arson Squad and the Accident Reconstruction Squad designated in this Court's April 22, 1994 Order as partial nonexempt employees in the amount of $9,284.00, which includes attorneys' fees and costs. Judgment is entered in favor of defendants as to all other issues.

SO ORDERED.

Dated this 26th day of August, 1994.

/s/ Clyde S. Cahill
CLYDE S. CAHILL
United States District Judge

APPENDIX E

[Filed Oct. 30, 1991]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Cause No. 88-2071-C-(4)

FRANCIS BERNARD AUER, *et al.*,
Plaintiffs,

v.

JAMES O'FLYNN, *et al.*,
Defendants.

MEMORANDUM AND ORDER

This matter comes before the Court on plaintiffs' motion for partial summary judgment on the issue of liability, as well as defendants' particular motion for summary judgment with respect to plaintiff Manuel Delgado only.

Plaintiffs bring this action for alleged violations of the time-and-one-half provisions for overtime work pursuant to the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.* (FLSA).

While this memorandum trails in detail the specific provisions of pertinent sections of the Fair Labor Standards Act, as cited by the plaintiffs, this Court is not now convinced that its applicability is as broad and conclusory as plaintiffs suggest. First, the St. Louis Police Department is not an ordinary civilian administrative agency; on the contrary, its function and mission require substantially higher levels of immediate responses than normally expected. These needs may well negate part of the ground rules which would be consonant with ordinary municipal functions. Second, the question of exemption from overtime compensation may well be unique because of the precarious fiscal condition of most municipalities.

But for now, in order to respond to the specific arguments advanced in the plaintiffs' motion for summary judgment, the Court will shadow the plaintiffs' arguments, and temporarily concede the applicability of the law to a quasi-military organization which is solely financed by a municipality with limited public funds.

Plaintiffs are all sergeants for the City of St. Louis, except for Delgado who is a lieutenant. Plaintiffs allege they have not been paid compensation in addition to their salaries for working overtime, whether it be eight hours in a day, forty hours in a week, or 171 hours in the twenty-eight day work period adopted by the Department pursuant to 29 U.S.C. § 207(k). The defendants pay FLSA overtime to all personnel classified below the rank of sergeant. Plaintiffs argue that the defendants consider them exempt under the "executive" exception, 29 U.S.C. §213(a)(1), *see also* 29 C.F.R. § 541.1(a)-(f).

Specifically, plaintiffs argue that they are not FLSA-exempt executives because: (a) St. Louis police sergeants and lieutenants are hourly employees; (b) St. Louis police sergeants' primary duty is neither management nor directly related to management policy making or general business operations; and (c) St. Louis police sergeants assigned to internal affairs, field inspection, and some investigators do not supervise at least two people. Defendants argue that there are material facts directly in dispute such that summary judgment is inappropriate. Defendants do concede that this Court may, nonetheless, dispose of certain elements of defendant's claim of exemption.

I. ANALYSIS

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment shall be rendered forthwith if the pleading, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that the moving party is entitled to judgment as a matter of law. The moving party must demonstrate that the record before it does not disclose a genuine dispute on a material fact. *Celotex v. Catrell,* 477 U.S. 317 (1986); *City of Mt. Pleasant, Iowa v. Associated Electrical Cooperatves, Inc.,* 838 F.2d 268 (8th Cir. 1988). Once the moving party has met its burden, the opponent must show the Court that there is a genuine dispute on a material issue. *City of Mt. Pleasant,* 838 F.2d at 274. All reasonable inferences from the evidence presented must be drawn in favor of the opposing party. *Masushita Electric Co., Ltd. v. Zenith Radio Corp.,* 475 U.S. 574, 106 S.Ct. 1348, 1356-57 (1986).

Under the applicable "short test" pursuant to 29 U.S.C. Section 541.1(f), the elements necessary to qualify for the executive exemption are:

> a) The plaintiffs' primary duty must consist of management of a customarily recognized subdivision of the department;
>
> b) The plaintiffs are compensated on a salary basis at a rate not less than $250.00 per week; and
>
> c) The plaintiffs customarily and regularly direct the work of two or more employees.

The employer bears the burden of showing that an employee is exempt under the Act. *Corning Glass Works v. Brennan,* 417 U.S. 188, 196-97 (1974); *Walling v. General Industries Co.,* 330 U.S. 545, 548-49 (1947).

II. LIEUTENANT DELGADO

The Court believes the only contested issues regarding plaintiff Delgado are whether his pay is on a salaried basis and whether his primary duties are managerial.[1] Plaintiff Delgado challenges his salaried status because (1) his pay is subject to reduction by manner of disciplinary leave without pay due to nonattendance (of less than a full day) during his shift; (2) his "comp time," (compensatory time) accumulated for overtime work while he was a nonexempt employee and carried over after promotion, is subject to being offset by nonattendance time on an hour-by-hour basis; and (3) his pay is at a premium for shift time during onerous hours of the night (a premium which is based on the number of such hours worked).

The Court, after careful consideration, is not persuaded by plaintiff's first argument in this regard because this kind of activity relates to possible disciplinary action that could be taken if plaintiff Delgado was absent without leave.[2] There is no evidence before this Court that

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[1] The Court finds no merit to plaintiff Delgado's argument that his platoon is not a recognized "department of [or] subdivision thereof." The organization of the various subdivisions within the Department breaks the city into various districts which are comprised of platoons and precincts. Each district is comprised of platoons commanded by district lieutenants. The platoons are comprised of precincts to which certain police officers are assigned, with a sergeant in charge of each precinct. Thus, the Court believes that any designation of platoons and precincts as anything other than recognized subdivisions of the district is unsubstantiated. See 29 C.F.R. § 104(a) (delineation by the statute that an exempt employee must manage a recognized unit with a continuing function.)

[2] Department Rule 7.004(c)(1) specifies that disciplinary action may be taken against a member of the Department who withdraws, resigns, or absents himself from duty without leave or fails to report for duty at his regularly appointed time. There are many possible penalties ranging from a reprimand to a five day suspension or dismissal for such offenses.

there exists any Departmental procedure for deducting from or "docking" a sergeant or higher ranking officer on an hour-by-hour basis because he or she did not work a certain number of hours. *See Harris v. District of Columbia*, 709 F. Supp. 238 (D.D.C. 1989); *District of Columbia Nurses Ass'n v. District of Columbia*, No. 87-1685 (D.D.C. Jan. 28, 1989) (where no evidence of an employee actually being docked for time missed, the court is not required to find that plaintiffs are not salaried).

Additionally, plaintiff Delgado argues that other factors should be considered, such as shift differential, compensatory time for overtime worked and recreational days computed, for salary purposes, into hourly equivalents. The Court, however, is not persuaded by plaintiff's arguments. Such additional compensation is not inconsistent with the salary basis of payment. See 29 C.F.R. § 541.118(a)-(b). Furthermore, shift differential is paid to every officer of every rank. The Court believes that a premium paid on account of duty during onerous hours, by its very nature, must correspond to the number of such hours worked; much the same as a percentage sales commission, by its very nature, corresponds to the size of the sale.[3] Plaintiff Delgado also challenges his salaried status by alleging that he does not have the discretion to control his work and his schedules which are indicative to payment on a salary basis. The Court, however, finds little merit to plaintiff's argument in this regard. Plaintiff

[3] This analogy implicates 29 C.F.R. § 541.118(b) which allows salaried status when the employee receives a predetermined amount plus "extras," e.g., sales commissions, etc. However, the Court does not rely on § 541.118(b) in holding that Delgado is salaried because his salary is not supplemented with extras. Rather, it is increased for different, or at least more burdensome work, as opposed to fluctuating on account of quality or quantity of work. Therefore, his pay scheme falls squarely within the 29 C.F.R. § 541.118(a) definition of salaried, and there is no need to look further.

Delgado is paid on a salary basis and must take whatever time is needed to complete the work assigned. He does have the discretion to prioritize those assignments based on their relative importance. The Court believes that this is consistent with the salary basis of compensation.

Plaintiff Delgado also challenges his exempt status in that he alleges that his primary duty is not managerial since he performs the same functions as his nonexempt subordinates. It appears that Delgado has withdrawn this contention but, whether he has or not, it is nevertheless without merit. As a lieutenant, Delgado is a watch commander which means he commands a platoon consisting of approximately 30 subordinate officers. Moreover, after considering a list of Delgado's functions, the Court believes that plaintiff's primary duty is managerial. Plaintiff's arguments appear to be mere conclusions.

The Court, therefore, finds that plaintiff Delgado is employed in a bona fide executive capacity within the meaning of the FLSA and is exempt from its overtime pay and record keeping requirements. Consequently, the Court shall grant defendants' motion for summary judgment on the claims of plaintiff Delgado.

III. PLAINTIFF SERGEANTS

The Court now turns to the plaintiff sergeants' motion for partial summary judgment. The Court believes that under the "short test," the only contested issue in this regard is whether each of the sergeant's primary duty is the management of a customarily recognized department.[4] At the time of the filing of this lawsuit all but two of plaintiff sergeants functioned as precinct sergeants in one or more of the Department's nine districts. Defendants argue that material facts are directly in dispute concern-

[4] The Court notes that its position regarding platoons as recognized units or subdivisions within the St. Louis Police Department is equally applicable to the precincts assigned to plaintiff precinct sergeants. (See footnote 1 *supra*.)

ing the primary duty of each of the plaintiffs and, as such, summary judgment is inappropriate.

Plaintiff sergeants allege, contrary to defendants' motion in opposition, that material facts are not at issue. Furthermore, the plaintiffs allege if facts do exist that are in dispute, these facts are not material to the issues before the Court.

After careful consideration, the Court finds that there do exist material facts at issue with respect to the duties and functions performed by plaintiff sergeants sufficient to overcome plaintiffs' motion for summary judgment. The Court finds that plaintiffs have simply made conclusory allegations as to the exact nature and substance of their duties. As a matter of law, the Court should not grant plaintiffs' motion. Consequently, the Court shall deny plaintiff sergeants' motion for summary judgment, but without prejudice. Accordingly,

IT IS HEREBY ORDERED that defendant's motion for summary judgment as to plaintiff Delgado is granted.

IT IS FURTHER ORDERED that plaintiff sergeants' motion for partial summary judgment is denied.

Dated this 30th day of October, 1991.

/s/ Clyde S. Cahill
CLYDE S. CAHILL
United States District Judge

APPENDIX F

STATUTES AND REGULATIONS

29 U.S.C.

§ 213. Exemptions

(a) Minimum wage and maximum hour requirements. The provisions of sections 6 (except section 6(d) in the case of paragraph (1) of this subsection) and 7 [29 USCS §§ 206, 207] shall not apply with respect to—

> (1) any employee employed in a bona fide executive, administrative, or professional capacity (including any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools), or in the capacity of outside salesman (as such terms are defined and delimited from time to time by regulations of the Secretary, subject to the provisions of the Administrative Procedure Act except than [that] an employee of a retail or service establishment shall not be excluded from the definition of employee employed in a bona fide executive or administrative capacity because of the number of hours in his workweek which he devotes to activities not directly or closely related to the performance of executive or administrative activities, if less than 40 per centum of his hours worked in the workweak are devoted to such activities); . . .

* * * *

29 C.F.R. Part 541.

§ 541.1 Executive.

The term *employee employed in a bona fide executive * * * capacity* in section 13(a)(1) of the Act shall mean any employee;

(a) Whose primary duty consists of the management of the enterprise in which he is employed or of a customarily recognized department of subdivision thereof; and

(b) Who customarily and regularly directs the work of two or more other employees therein; and

(c) Who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring or firing and as to the advancement and promotion or any other change of status of other employees will be given particular weight; and

(d) Who customarily and regularly exercises discretionary powers; and

(e) Who does not devote more than 20 percent, or, in the case of an employee of a retail or service establishment who does not devote as much as 40 percent, of his hours of work in the workweek to activities which are not directly and closely related to the performance of the work described in paragraphs (a) through (d) of this section: *Provided*, That this paragraph shall not apply in the case of an employee who is in sole charge of an independent establishment or a physically separated branch establishment, or who owns at least a 20-percent interest in the enterprise in which he is employed; and

(f) Who is compensated for his services on a salary basis at a rate of not less than $155 per week (or $130 per week, if employed by other than the Federal Government in Puerto Rico, the Virgin Islands, or American Samoa), exclusive of board, lodging, or other facilities: *Provided*, That an employee who is compensated on a

salary basis at a rate of not less than $250 per week (or $200 per week, if employed by other than the Federal Government in Puerto Rico, the Virgin Islands or American Samoa), exclusive of board, lodging, or other facilities, and whose primary duty consists of the management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof, and includes the customary and regular direction of the work of two or more other employees therein, shall be deemed to meet all the requirements of this section.

[38 FR 11390, May 7, 1973, as amended at 40 FR 7092, Feb. 19, 1975]

EFFECTIVE DATE NOTE: Paragraph (f) in § 541.1 was revised at 46 FR 3013, Jan. 13, 1981. In accordance with the President's Memorandum of January 29, 1981 (46 FR 11227, Feb. 6, 1981), the effective date was postponed indefinitely at 46 FR 11972, Feb. 12, 1981.

The text of paragraph (f) set forth above remains in effect pending further action by the issuing agency. The text of the postponed regulation appears below.

§ 541.1 Executive.

* * * *

(f) Who is compensated for his services on a salary basis at a rate of not less than $225 per week beginning February 13, 1981 and $250 per week beginning February 13, 1983 (or $180 per week beginning February 13, 1981 and $200 per week beginning February 13, 1983. If employed by other than the Federal Government in Puerto Rico, the Virgin Islands, or American Samoa), exclusive of board, lodging, or other facilities: PROVIDED, That an employee who is compensated on a salary basis at a rate of not less than $320 per week beginning February 13, 1981 and $345 per week beginning February 13, 1983 (or $260 per week beginning February 13, 1981 and $285 per week beginning February 13, 1983, if employed

by other than the Federal Government in Puerto Rico, the Virgin Islands or American Samoa), exclusive of board, lodging, or other facilities, and whose primary duty consists of the management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof, and includes the customary and regular direction of the work of two or more other employees therein, shall be deemed to meet all the requirements of this section.

§ 541.2 Administrative.

The term *employee employed in a bona fide* * * * *administrative* * * * *capacity* in section 13(a)(1) of the Act shall mean any employee:

(a) Whose primary duty consists of either;

(1) The performance of office or nonmanual work directly related to management policies or general business operations of his employer or his employer's customers, or

(2) The performance of functions in the administration of a school system, or educational establishment or institution, or of a department or subdivision thereof, in work directly related to the academic instruction or training carried on therein; and

(b) Who customarily and regularly exercises discretion and independent judgment; and

(c)(1) Who regularly and directly assists a proprietor, or an employee employed in a bona fide executive or administrative capacity (as such terms are defined in the regulations of this subpart), or

(2) Who performs under only general supervision work along specialized or technical lines requiring special training, experience, or knowledge, or

(3) Who executes under only general supervision special assignments and tasks; and

(d) Who does not devote more than 20 percent, or, in the case of an employee of a retail or service establishment who does not devote as much as 40 percent, of his hours worked in the workweek to activities which are not directly and closely related to the performance of the work described in paragraphs (a) through (c) of this section;

(e)(1) Who is compensated for his services on a salary or fee basis at a rate of not less than $155 per week ($130 per week, if employed by other than the Federal Government in Puerto Rico, the Virgin Islands, or American Samoa), exclusive of board, lodging, or other facilities, or

(2) Who, in the case of academic administrative personnel, is compensated for services as required by paragraph (e)(1) of this section, or on a salary basis which is at least equal to the entrance salary for teachers in the school system, educational establishment, or institution by which employed: *Provided*, That an employee who is compensated on a salary or fee basis at a rate of not less than $250 per week ($200 per week if employed by other than the Federal Government in Puerto Rico, the Virgin Islands, or American Samoa), exclusive of board, lodging, or other facilities, and whose primary duty consists of the performance of work described in paragraph (a) of this section, which includes work requiring the exercise of discretion and independent judgment, shall be deemed to meet all the requirements of this section.

[38 FR 11390, May 7, 1973, as amended at 40 FR 7092, Feb. 19, 1975]

EFFECTIVE DATE NOTE: Paragraph (e) in § 541.2 was revised at 46 FR 3013, Jan. 13, 1981. In accordance with the President's Memorandum of January 29, 1981 (46 FR 11227, Feb. 6, 1981), the effective date was postponed indefinitely at 46 FR 11972, Feb. 12, 1981.

The text of paragraph (e) set forth above remains in effect pending further action by the issuing agency. The text of the postponed regulation appears below.

§ 541.2 Administrative.

* * * *

(e)(1) Who is compensated for his services on a salary or fee basis at a rate of not less than $225 per week beginning February 13, 1981 and $250 per week beginning February 13, 1983 ($180 per week beginning February 13, 1981 and $200 per week beginning February 13, 1983, if employed by other than the Federal Government in Puerto Rico, the Virgin Islands, or American Samoa), exclusive of board, lodging, or other facilities, or

(2) Who, in the case of academic administrative personnel, is compensated for services as required by paragraph (e)(1) of this section, or on a salary basis which is at least equal to the entrance salary for teachers in the school system, educational establishment, or institution by which employed: *Provided*, That an employee who is compensated on a salary or fee basis at a rate of not less than $320 per week beginning February 13, 1981 and $345 per week beginning February 13, 1983 ($260 per week beginning February 13, 1981 and $285 per week beginning February 13, 1983, if employed by other than the Federal Government in Puerto Rico, the Virgin Islands, or American Samoa), exclusive of board, lodging, or other facilities, and whose primary duty consists of the performance of work described in paragraph (a) of this section, which includes work requiring the exercise of discretion and independent judgment, shall be deemed to meet all the requirements of this section.

* * * *

§ 541.118 Salary basis.

(a) An employee will be considered to be paid "on a salary basis" within the meaning of the regulations if under his employment agreement he regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work

performed. Subject to the exceptions provided below, the employee must receive his full salary for any week in which he performs any work without regard to the number of days or hours worked. This policy is also subject to the general rule that an employee need not be paid for any workweek in which he performs no work.

(1) An employee will not be considered to be "on a salary basis" if deductions from his predetermined compensation are made for absences occasioned by the employer or by the operating requirements of the business. Accordingly, if the employee is ready, willing, and able to work, deductions may not be made for time when work is not available.

(2) Deductions may be made, however, when the employee absents himself from work for a day or more for personal reasons, other than sickness or accident. Thus, if an employee is absent for a day or longer to handle personal affairs, his salaried status will not be affected if deductions are made from his salary for such absences.

(3) Deductions may also be made for absences of a day or more occasioned by sickness or disability (including industrial accidents) if the deduction is made in accordance with a bona fide plan, policy or practice of providing compensation for loss of salary occasioned by both sickness and disability. Thus, if the employer's particular plan, policy or practice provides compensation for such absences, deductions for absences of a day or longer because of sickness or disability may be made before an employee has qualified under such plan, policy or practice, and after he has exhausted his leave allowance thereunder. It is not required that the employee be paid any portion of his salary for such days or days for which he receives compensation for leave under such plan, policy or practice. Similarly, if the employer operates under a State sickness and disability insurance law, or a private sickness and disability insurance plan, deductions may be made for absences of a working day or longer if benefits are

provided in accordance with the particular law or plan. In the case of an industrial accident, the "salary basis" requirement will be met if the employee is compensated for loss of salary in accordance with the applicable compensation law or the plan adopted by the empioyer, provided the employer also has some plan, policy or practice of providing compensation for sickness and disability other than that relating to industrial accidents.

(4) Deductions may not be made for absences of an employee caused by jury duty, attendance as a witness, or temporary military leave. The employer may, however, offset any amounts received by an employee as jury or witness fees or military pay for a particular week against the salary due for that particular week without loss of the exemption.

(5) Penalties imposed in good faith for infractions of safety rules of major significance will not affect the employee's salaried status. Safety rules of major significance include only those relating to the prevention of serious danger to the plant, or other employees, such as rules prohibiting smoking in explosive plants, oil refineries, and coal mines.

(6) The effect of making a deduction which is not permitted under these interpretations will depend upon the facts in the particular case. Where deductions are generally made when there is no work available, it indicates that there was no intention to pay the employee on a salary basis. In such a case the exemption would not be applicable to him during the entire period when such deductions were being made. On the other hand, where a deduction not permitted by these interpretations is inadvertent, or is made for reasons other than lack of work, the exemption will not be considered to have been lost if the employer reimburses the employee for such deductions and promises to comply in the future.

(b) *Minimum guarantee plus extras.* It should be noted that the salary may consist of a predetermined

amount constituting all or part of the employee's compensation. In other words, additional compensation besides the salary is not inconsistent with the salary basis of payment. The requirement will be met, for example, by a branch manager who receives a salary of $155 or more a week and in addition, a commission of 1 percent of the branch sales. The requirement will also be met by a branch manager who receives a percentage of the sales or profits of the branch, if the employment arrangement also includes a guarantee of at least the minimum weekly salary (or the equivalent for a monthly or other period) required by the regulations. Another type of situation in which the requirement will be met is that of an employee paid on a daily or shift basis, if the employment arrangement includes a provision that the employee will receive not less than the amount specified in the regulations in any week in which the employee performs any work. Such arrangements are subject to the exceptions in paragraph (a) of this section. The test of payment on a salary basis will not be met, however, if the salary is divided into two parts for the purpose of circumventing the requirement of payment "on a salary basis". For example, a salary of $200 in each week in which any work is performed, and an additional $50 which is made subject to deductions which, are not permitted under paragraph (a) of this section.

(c) *Initial and terminal weeks.* Failure to pay the full salary in the initial or terminal week of employment is not considered inconsistent with the salary basis of payment. In such weeks the payment of a proportionate part of the employee's salary for the time actually worked will meet the requirement. However, this should not be construed to mean that an employee is on a salary basis within the meaning of the regulations if he is employed occasionally for a few days and is paid a proportionate part of the weekly salary when so employed. Moreover, even payment of the full weekly salary under such circumstances would not meet the requirement, since casual

or occasional employment for a few days at a time is inconsistent with employment on a salary basis within the meaning of the regulations.

[38 FR 11390, May 7, 1973, as amended at 40 FR 7092, Feb. 19, 1975]

EFFECTIVE DATE NOTE: Paragraph (b) in § 541.118 was revised at 46 FR 3014, Jan. 13, 1981. In accordance with the President's Memorandum of January 29, 1981 (46 FR 11227, Feb. 6, 1981), the effective date was postponed indefinitely at 46 FR 11972, Feb. 12, 1981.

The text of paragraph (b) set forth above remains in effect pending further action by the issuing agency. The text of the postponed regulation appears below.

§ 541.118 Salary basis.

* * * *

(b) *Minimum guarantee plus extras.* It should be noted that the salary may consist of a predetermined amount constituting all or part of the employee's compensation. In other words, additional compensation besides the salary is not inconsistent with the salary basis of payment. The requirement will be met, for example, by a branch manager who receives a salary of $250 or more a week and in addition, a commission of 1 percent of the branch sales. The requirement will also be met by a branch manager who receives a percentage of the sales or profits of the branch, if the employment arrangement also includes a guarantee of at least the minimum weekly salary (or the equivalent for a monthly or other period) required by the regulations. Another type of situation in which the requirement will be met is that of an employee paid on a daily or shift basis, if the employment arrangement includes a provision that the employee will receive not less than the amount specified in the regulations in any week in which the employee performs any work. Such arrangements are subject to the exceptions in paragraph (a) of this section. The test of

payment on a salary basis will not be met, however, if the salary is divided into two parts for the purpose of circumventing the requirement of payment "on a salary basis". For example, a salary of $300 in each week in which any work is performed, and an additional $55 which is made subject to deductions which are not permitted under paragraph (a) of this section.

* * * *

§ 541.5d Special provisions applicable to employees of public agencies.

(a) An employee of a public agency who otherwise meets the requirements of § 541.118 shall not be disqualified from exemption under §§ 541.1, 542.2, or 541.3 on the basis that such employee is paid according to a pay system established by statute, ordinance, or regulation, or by a policy or practice established pursuant to principles of public accountability, under which the employee accrues personal leave and sick leave and which requires the public agency employee's pay to be reduced or such employee to be placed on leave without pay for absences for personal reasons or because of illness or injury of less than one work-day when accrued leave is not used by an employee because—

(1) permission for its use has not been sought or has been sought and denied.

(2) accrued leave has been exhausted; or

(3) the employee chooses to use leave without pay.

(b) Deductions from the pay of an employee of a public agency for absences due to a budget-required furlough shall not disqualify the employee from being paid "on a salary basis" *except* in the workweek in which the furlough occurs and for which the employee's pay is accordingly reduced.

[57 FR 37677, Aug. 19, 1992]

DEPARTMENT OF LABOR
Employment Standards Administration;
Wage and Hour Division

29 CFR Part 541
Exemptions From Minimum Wage and Overtime Compensation Requirements of the Fair Labor Standards Act; Public Sector Employers

56 FR 45824

September 6, 1991

AGENCY: Wage and Hour Division, Employment Standards Administration, Labor

ACTION: Interim final rule; request for comments.

SUMMARY: These interim final regulations relative to governmental pay practices under Regulations, 29 CFR part 541, contain revised criteria for exemption from the minimum wage and overtime compensation requirements of the Fair Labor Standards Act (FLSA) for executive, administrative, and professional employees. The purpose of this revision is to provide an exception from certain provisions requiring payment "on a salary basis" applicable only to public sector employees.

DATES: Effective Date: The interim final rule is effective on September 6, 1991.

Comments are due on or before October 7, 1991.

ADDRESSES: Submit written comments to John R. Fraser, Acting Administrator, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, room S-3502, 200 Constitution Avenue, NW., Washington, DC 20210. Commenters who wish to receive notification of receipt of comments are requested to include a self-addressed, stamped post card.

FOR FURTHER INFORMATION CONTACT: J. Dean Speer, Director, Division of Policy and Analysis, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, room S-3506, 200 Constitution Avenue, NW., Washington, DC 20210; telephone (202) 523-8412 (this is not a toll-free number).

SUPPLEMENTARY INFORMATION:

I. Background

Since the enactment of the FLSA in 1938, Congress and the Supreme Court have each periodically acknowledged the special circumstances of, and the different treatment to be accorded to, governmental employers and employees under the FLSA, as distinguished from employment in the private sector.

The regulations governing exemption from the requirements of the Act for employees who are "executive, administrative, professional * * *" generally require that such employees meet regulatory standards with respect to both their duties and their compensation. Compensation must be greater than the amount specified in the regulations, and must be "on a salary basis." These matters are defined and explained in 29 CFR part 541. These regulations were adopted prior to the extension of FLSA coverage to public employees and, therefore, make no distinction between public and private employment.

In administering the FLSA in the public sector [1], the Department has become aware that few public employers

[1] With respect to Federal employees, as provided in section 4(f) of FLSA, DOL administers the Act for employees employed in the Library of Congress, United States Postal Service, Postal Rate Commission, and the Tennessee Valley Authority; the Office of Personnel Management (OPM) administers FLSA with respect to all other employees of the Federal government except certain Congressional employees. See 29 U.S.C. section 204(f), Reorganization Plan No. 2 of 1978 (92 Stat. 3783), and section 8 of the Fair Labor

compensate employees in a manner that meets the "on a salary basis" requirement for exemption under the current regulation. Governmental payroll systems commonly prohibit paying employees for time not actually worked. Systems of leave in the public sector (as often is the case in the private sector) are generally relied on as the exclusive method to permit employees who might otherwise not be compensated for periods of absence to avoid reduction of compensation in connection with such absences.

The Department initially attempted to address this problem by means of an enforcement policy, adopted by the Wage and Hour Division on January 9, 1987. The policy, which is still in effect, provides that the Division, will not deny exemption pursuant to section 13(a)(1) of the FLSA to an otherwise exempt executive, administrative, or professional employee in the public sector whose pay is reduced by deductions for absence(s) of less than a day for personal reasons, or because of illness or accident, because the employee does not have, or has exhausted available paid leave for such absence(s). This policy applies only where applicable State or local law, in effect before April 15, 1986, prohibits payment to employees for such absences which are not covered by paid leave.

The Wage and Hour Division's 1987 enforcement policy does not affect the rights of public employees to file private lawsuits under section 16(b) of the FLSA. Since the U.S. Supreme Court's decision in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), there have been numerous lawsuits by public employees to recover overtime pay. The courts in these cases have approached the construction of the regulations in different fashions, and have reached differing results.

Standards Amendments of 1989 (Pub. L. 101-157). Thus, the reference to Federal government employees in this rulemaking extends the revision to those Federal employees with respect to whom DOL is authorized to administer the Act.

Some courts have found the exemption to be inapplicable for the sole reason that the public entity's pay practices did not meet the "on a salary basis" requirement. Construing the existing regulations, some courts have held that employees under a pay system which requires that deductions be made when the employee is absent and has no leave are not paid "on a salary basis" even where no such deductions have occurred. In these circumstances the "salary basis" requirement is not met because the employee's compensation was subject to deductions for absences of less than one day when all accumulated leave was exhausted. See, *e.g.*, *Abshire v. County of Kern*, 908 F.2d 483 (9th Cir. 1990) cert. denied, 111 S.Ct. 785, rehearing denied, 111 S.Ct. 1341 (1991); *Banks v. City of North Little Rock*, 708 F. Supp. 1023 (E.D. Ark. 1988); *D'Camera v. District of Columbia*, 693 F. Supp. 1208 (D.D.C. 1988); *Hawks v. City of Newport News, Va.*, 707 F. Supp. 212 (E.D. Va. 1988).

On the other hand, some courts have considered that even in the above-described circumstances a salary was not subject to deduction where there was no evidence that the employee's pay was ever reduced, that only actual and not "theoretical" deductions could invalidate the salary basis of compensation, and that rare instances of docking pay for absences of less than a day did not defeat the exemption (except in a workweek in which deduction was made). See, *e.g.*, *Atlanta Professional Firefighters Union v. Atlanta*, 920 F.2d 800 (11th Cir. 1991); *Harris v. District of Columbia*, 709 F. Supp. 238 (D.D.C. 1989); and *DC Nurses Assn. v. District of Columbia*, 29 WH Cases 868 (D.D.C. 1988). Some courts have also allowed application of the "correction" provisions at 29 CFR 541.118(a)(6) to preserve exempt status in cases where the public employer made "inadvertent" deductions from pay for absences of less than a day when leave was exhausted, reimbursed the affected employee for such deductions, and promised future compliance. See *e.g.*, *Hartman*

v. Arlington County, Va., 720 F. Supp. 1227 (E.D. Va. 1989), *aff'd*, 903 F.2d 290 (4th Cir. 1990); *Fire Fighters Local 2141 v. City of Alexandria, Va.*, 720 F. Supp. 1230 (E.D. Va. 1989), *aff'd.*, 912 F.2d 463 (4th Cir. 1990); *Harkins v. City of Chesapeake*, 29 WH Cases 1399 (E.D. Va. 1988). *Chadwick v. City of Norfolk, Va.*, 29 WH Cases 1407 (E.D. Va. 1988); and *Sarver v. City of Roanoke, Va.*, 29 WH Cases 1442 (W.D. Va. 1989).

The Department has been considering (and continues to consider) a variety of posible changes to the regulations governing the exemption for bona fide executive administrative, and professional employees, including the particular requirement in the public sector that such employees be paid on a salary basis.

In the meantime, these diverging judicial interpretations and accompanying confusion have developed, resulting in the exposure of governmental employers to potentially enormous and generally unexpected back wage liabilities to employees, some of whom would clearly be exempt if duties and amount of compensation alone were examined. Such unforeseen liabilities could seriously threaten the fiscal integrity of State and local governmental agencies, and could seriously disrupt widespread pay practices that were designed and intended to serve the public trust and were established long before State and local government employees were subject to the Fair Labor Standards Act.

State and local government jurisdictions have varied pay policies. Some of these pay policies are based on constitutional or statutory provisions while others are derived from regulations or policies that have evolved over the years. These pay systems are generally premised on the concept—based on principles of public accountability—that governmental employees should not be paid for time not worked, and that there is a need to be accountable to the taxpayers for the expenditure of public funds.

For these reasons the Department is of the view that public sector pay systems must be analyzed differently from, because they are significantly distinguishable from, private sector pay systems. In the Department's judgment, certain aspects of the existing "salary basis" regulatory requirement for exemption are unduly restrictive when applied in the public sector. These aspects are not, in the Department's judgment, valid indicators in the public sector of the *bona fides* of a claimed exemption under section 13(a)(1). State and local government are thus inappropriately deprived of the opportunity to apply the section 13(a)(1) exemption to their employees who would otherwise be properly exempt.

While the Department is continuing its overall review of the full range of issues raised by the public comments submitted on its advance notice of proposed rulemaking of November 19, 1985 (50 FR 47696), it is undertaking this separate rulemaking on the specific issue of application of the "salary basis" of payment for public sector employees. As discussed below, it is considered necessary to issue an interim final rule so as to stem any accrual of additional liability to State and local governments while consideration is given to the comments received on the rule.

II. Paperwork Reduction Act

This regulation contains no reporting or recordkeeping requirements.

III. Summary of the Rule

A new § 541.5d is being added that provides that an otherwise exempt public sector employee who is paid according to a pay system that requires the use of paid leave and, absent the use of paid leave, reduces the employee's pay for absences of less than one workday, will not be disqualified from exemption due to such pay system. This rule also provides that the exemption will not

be defeated by deductions from salary caused by budget-required furloughs, which are not regular and recurring, except in the workweek in which such a deduction occurs.

Executive Order 12291

This rule is not considered to be a "major rule" within the meaning of Executive Order 12291, in that under the status quo, most public employers consider otherwise-exempt employees to be exempt, notwithstanding public sector pay systems under which their pay is subject to deductions for absences of less than one day. Furthermore, under current Department of Labor enforcement policy, the exemption would generally not be denied by the Department to such employees. Therefore the rule is not likely to result in: (1) An annual effect on the economy of $100 million or more; (2) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets. Therefore, no regulatory impact analysis is required.

Regulatory Flexibility Analysis

The Department has determined that this rulemaking will not have a significant economic impact on a substantial number of small entities. This conclusion is based on the fact that under the status quo, most public employers consider otherwise-exempt employees to be exempt, notwithstanding public sector pay systems under which their pay is subject to deductions for absences of less than one day. Furthermore, under the current Department of Labor enforcement policy, the exemption would generally not be denied by the Department to such employees. In addition, because no notice of proposed rulemaking is required for the rule under 5 U.S.C. 553(b), the requirements of the Regulatory Flexibility Act pertaining to regulatory flexibility analysis do not apply to this rule. See 5 U.S.C. 601(2).

Publication as an Interim Final Rule

Application of the salary basis test to State and local government employees may result in denial of the exemption to thousands of such employees who have been considered exempt by their employers. The Department considers it inappropriate that public sector employees be denied the exemption because they fail to meet the "on a salary basis" test under pay systems imposed by law, regulation or public policy that were established pursuant to principles of public accountability even before extension of the Act to such employees. Such application could well result in enormous, unforseen liability of such governments and may threaten their fiscal integrity. For these reasons it has been determined that an interim final rule is appropriate to forestall accrual of additional liability while the Department receives and considers comments in the preparation of any final rule which would be determined to be appropriate. Accordingly, the Secretary finds, pursuant to 5 U.S.C. 553(b)(3)(B), that prior notice and public comment are contrary to the public interest.

For the same reasons, the Secretary also for good cause finds, pursuant to 5 U.S.C. 553(d)(3), that this rule cannot be published 30 days before its effective date.

DEPARTMENT OF LABOR
Employment Standards Administration;
Wage and Hour Division

29 CFR Part 541
Exemptions From Minimum Wage and
Overtime Compensation Requirements
of the Fair Labor Standards Act;
Public Sector Employers

56FR45828
September 6, 1991

AGENCY: Wage and Hour Division. Employment Standards Administration, Labor.

ACTION: Notice of proposed rulemaking, request for comments.

SUMMARY: The Department of Labor proposes to revise the regulations governing exemption from minimum wage and overtime compensation under the Fair Labor Standards Act (FLSA) for executive, administrative and professional employees in the public sector. This proposal would allow governmental entities to restore eligibility for exemption under the rules governing payment "on a salary basis" at 29 CFR part 541, § 541.118(a)(6), for otherwise-exempt public employees subject to pay systems that provide for the use of paid leave and, when accrued leave is not used, result in deductions from pay for absences of less than one work-day.

DATES: Comments are due on or before Ocotber 7, 1991.

ADDRESSES: Submit written comments to John R. Fraser, Acting Administrator, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, room S-3502, 200 Constitution Avenue, NW., Washington, DC 20210. Commenters who wish to receive notification of receipt of comments are requested to include a self-addressed, stamped post card.

FOR FURTHER INFORMATION CONTACT: J. Dean Speer, Director, Division of Policy and Analysis, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, room S-3506, 200 Constitution Avenue, NW., Washington, DC 20210; telephone (202) 523-8412 (this is not a toll-free number).

SUPPLEMENTARY INFORMATION:

I. Background

Since the enactment of the FLSA in 1938, Congress and the Supreme Court has each periodically acknowledged the special circumstances of, and the different treatment to be accorded to, governmental employers and employees under the FLSA, as distinguished from employment in the private sector.

The regulations governing exemption from the requirements of the Act for employees who are "executive, administrative, professional * * *" generally require that such employees meet regulatory standards with respect both to their duties and their compensation. Compensation must be greater than the amount specified in the regulations, and must be "on a salary basis." These matters are defined and explained in 29 CFR part 541. These regulations were adopted prior to the extension of FLSA coverage to public employees and, therefore, make no distinction between public and private employment.

In administering the FLSA in the public sector [1] the Department has become aware that few public employers

[1] With respect to Federal employees, as provided in section 4(f) of FLSA, DOL administers the Act for employees employed in the Library of Congress, United States Postal Service, Postal Rate Commission, and the Tennessee Valley Authority; the Office of Personnel Management (OPM) administers FLSA with respect to all other employees of the federal government except certain Congressional employees. See 29 U.S.C. 204(f), Reorganization Plan No. 2 of 1978 (92 Stat. 3783), and § 8 of the Fair Labor Standards Amendments of 1989 (Pub. L. 101-157). Thus, the reference to Federal Government employees in this rulemaking extends the

compensate employees in a manner that meets the "on a salary basis" requirement for exemption under the current regulation. Governmental payroll systems commonly prohibit paying employees for time not actually worked. Systems of leave in the public sector (as often is the case in the private sector) are generally relied on as the exclusive method to permit employees who might otherwise not be compensated for periods of absence to avoid reduction of compensation in connection with such absences.

The Department initially attempted to address this problem by means of an enforcement policy adopted by the Wage and Hour Division in January 1987. The policy, which it still in effect, provides that the Division will not deny exemption pursuant to section 13(a)(1) of the FLSA to an otherwise exempt executive, administrative, or professional employee in the public sector whose pay is reduced by deductions for absence(s) of less than a day for personal reasons, or because of illness or accident, because the employee does not have, or has exhausted available paid leave for such absence(s). This policy applied only where applicable State or local law in effect prior to April 15, 1986, prohibits payment to employees for such absences which are not covered by paid leave.

The Wage and Hour Division's 1987 enforcement policy does not affect the rights of public employees to file private lawsuits under section 16(b) of the FLSA. Since the U.S. Supreme Court's decision in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), there have been numerous lawsuits by public employees to recover overtime pay. The courts in these cases have approached the construction of the regulations in different fashions, and have reached differing results.

Some courts have found the exemption to be inapplicable for the sole reason that the public entity's pay practices did not meet the "on a salary basis" requirement.

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revision to those Federal employees with respect to whom DOL is authorized to administer the Act.

Construing the existing regulations, some courts have held that employees under a pay system which requires that deductions be made when the employee is absent and has no leave are not paid "on a salary basis" even where no such deductions have occurred. In these circumstances the "salary basis" requirement is not met because the employee's compensation was subject to deductions for absences of less than one day when all accumulated leave was exhausted. *See, e.g., Abshire v. County of Kern*, 908 F.2d 483 (9th Cir. 1990) *cert. denied*, 111 S.Ct. 785, *rehearing denied*, 111 S.Ct. 1341 (1991); *Banks v. City of North Little Rock*, 708 F. Supp. 1023 (E.D. Ark. 1988); *D'Camera v. District of Columbia*, 693 F. Supp. 1208 (D.D.C. 1988); *Hawks v. City of Newport News, Va.*, 707 F. Supp. 212 (E.D. Va. 1988).

On the other hand, some courts have considered that even in the above-described circumstances a salary was not subject to deduction where there was no evidence that the employee's pay was ever reduced, that only actual and not "theoretical" deductions could invalidate the salary basis of compensation, and that rare instances of docking pay for absences of less than a day did not defeat the exemption (except in a workweek in which deduction was made). See, *e.g., Atlanta Professional Firefighters Union v. Atlanta*, 920 F.2d 800 (11th Cir. 1991); *Harris v. District of Columbia*, 709 F. Supp. 238 (D.D.C. 1989); and *D.C. Nurses Assn. v. District of Columbia*, 29 WH Cases 868 (D.D.C. 1988). Some courts have also allowed application of the "correction" provisions at 29 CFR 541.118(a)(6) to preserve exempt status in cases where the public employer made "inadvertent" deductions from pay for absences of less than a day when leave was exhausted, reimbursed the affected employee for such deductions, and promised future compliance. See, *e.g., Hartman v. Arlington County, Va.*, 720 F. Supp. 1227 (E.D. Va. 1989), aff'd, 903 F.2d 290 (4th Cir. 1990); *Fire Fighters Local 2141 v. City of Alexandria, Va.*, 720 F. Supp. 1230 (E.D. Va. 1989), aff'd, 912

F. 2d 463 (4th Cir. 1990); *Harkins v. City of Chesapeake*, 29 WH Cases 1399 (E.D. Va. 1988); *Chadwick v. City of Norfolk, Va.*, 29 WH Cases 1407 (E.D. Va. 1988); and *Sarver v. City of Roanoke, Va.*, 29 WH Cases 1442 (W.D. Va. 1989).

The Department has been considering (and continues to consider) a variety of possible changes to the regulations governing the exemption for bona fide executive, administrative, and professional employees, including the particular requirements in the public sector affecting how employees may be paid on a salary basis. (Interim final regulations implementing a special "salary basis" rule for public sector employers are being published separately this date in the Federal Register, to be codified at 29 CFR 541.5d.)

In the meantime, these diverging judicial interpretations and accompanying confusion have developed, resulting in the exposure of governmental employers to potentially enormous and generally unexpected back wage liabilities to employees, some of whom would clearly be exempt if duties and amount of compensation alone were examined. The payment of such unforeseen liabilities could seriously threaten the fiscal integrity of State and local governmental agencies, and could seriously disrupt widespread pay practices which were designed and intended to serve the public trust and were established long before State and local government employees were subject to the Fair Labor Standards Act.

For these reasons the Department is of the view that public sector pay systems must be analyzed differently from, because they are significantly distinguishable from, private sector pay systems. In the Department's judgment, certain aspects of the existing "salary basis" regulatory requirement for exemption are unduly restrictive when applied in the public sector. State and local governments are thus inappropriately deprived of the opportunity to apply the section 13(a)(1) exemption to their employees who would otherwise be bona fide exempt.

While the Department is continuing its overall review of the full range of issues raised by the public comments submitted on its advance notice of proposed rulemaking of November 19, 1985 (50 FR 47696), it is undertaking this separate rulemaking proposal on the specific issue of measures that could be taken by public employers to restore the exempt status of public employees who would otherwise have been exempt but for pay systems calling for deductions (i.e., where no actual deductions are made and where actual deductions made are reimbursed) inconsistent with the "on a salary basis" requirement for public sector employees.

This proposal would operate in conjunction with the Department's newly-published interim final rule regarding salary basis in the public sector. (See the interim final rule published separately this date in the Federal Register, at 29 CFR 541.5d.) The proposal would, in essence, provide that employees previously subject to deductions under a pay system that now passes muster under § 541.5d, and, with respect to whom actual deductions have been reimbursed, shall be restored to exempt status under § 541.118(a)(6). As with the existing § 541.118 (a)(6), this provision deals with a situation which has arisen unexpectedly when some parts, but not all essential parts, of the regulatory requirements for exemption have been met with respect to public sector employees. Unlike the existing § 541.118(a)(6), which deals primarily with occasional "inadvertent" deductions from the pay of employees who are generally paid in a "salary basis" structure, this provision would deal with the effect of past deductions made by virtue of a pay system that may otherwise have resulted in a complete disallowance of the exemption.

The Department seeks comments on all aspects of this proposal, in particular drawing the attention of commenters to legal and other considerations regarding: (1) The retroactive aspects of the proposal; and (2) the fairness of the proposal, both to employers and employees.

II. Paperwork Reduction Act

This regulation contains no reporting or recordkeeping requirements.

III. Summary of the Rule

The rule provides that eligibility for the exemption under the requirement that employees be paid "on a salary basis" will not be defeated in the case of governmental entities that either: (1) Made no deductions from pay for absences of less than one work-day before the effective date of new regulations promulgated at 29 CFR 541.5d (i.e., September 6, 1991), or (2) reimburse otherwise-exempt public employees for deductions from pay made for absences, for personal reasons or because of illness or injury, of less than one work-day that occurred before the effective date of § 541.5d.

Executive Order 12291

This rule is not considered to be a "major rule" within the meaning of Executive Order 12291, in that under the status quo, most public employers consider otherwise-exempt employees to be exempt, notwithstanding public sector pay systems under which their pay is subject to deductions for absences of less than one day. Furthermore, under the current Department of Labor enforcement policy, the exemption would generally not be denied by the Department to such employees. Therefore the rule is not likely to result in: (1) An annual effect on the economy of $100 million or more; (2) a major increase in costs or prices for consumers, individual industries, federal, state, or local government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets. Therefore, no regulatory impact analysis is required.

Regulatory Flexibility Analysis

The Department has determined that this rulemaking will not have a significant economic impact on a substantial number of small entities. The Secretary has certified to this effect to the Chief Counsel for Advocacy of the Small Business Administration. This conclusion is based on the fact that under the status quo, most public employers consider otherwise-exempt employees to be exempt, notwithstanding that under some public sector pay systems the pay of employees is subject to deductions for absences of less than one day. Furthermore, under current Department of Labor enforcement policy, the exemption would generally not be denied by the Department to such employees.

Document Preparation

This document was prepared under the direction and control of John R. Fraser, Acting Administrator, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor.

List of Subjects in 29 CFR Part 541

Labor, Minimum wages, Overtime pay, Salaries, Teachers, Wages.

Accordingly, part 541 of Title 29 of the Code of Federal Regulations is proposed to be amended as set forth below.

APPENDIX G

POLICE MANUAL

METROPOLITAN POLICE DEPARTMENT

City of Saint Louis, Missouri

COLONEL ROBERT E. SCHEETZ

Chief of Police

Published

by the

BOARD OF POLICE COMMISSIONERS

1989

HONORABLE JOHN ASHCROFT

Governor of the State of Missouri

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JESSE HORSTMAN	SECRETARY

COLONEL ROBERT E. SCHEETZ	CHIEF OF POLICE

By virtue of the authority vested in it by law and pursuant to the provisions of Section 84.170, Missouri Revised Statutes, the Board of Police Commissioners of the Metropolitan Police Department of the City of St. Louis, Missouri, has published this manual of rules and regulations for the government and regulation of the Metropolitan Police Department of said city, effective on and after the date set out below.

The Board reserves the right to alter, amend, or revoke any of said rules and regulations and to make additional ones from time to time as circumstances or the good of the service may, in the judgment of the Board, require.

The Police Manual of 1984 and all General Orders of the Board of Police Commissioners issued prior to the date set out below are hereby repealed.

By Order of the Board of Police Commissioners of the City of Saint Louis, this tenth day of April, 1989.

/s/ Robert J. Baer
ROBERT J. BAER
President

/s/ William H. Young
WILLIAM H. YOUNG
Treasurer

/s/ John J. Frank
JOHN J. FRANK
Vice-President

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Purchasing Member

/s/ Jesse Horstman
JESSE HORSTMAN
Secretary to the Board

A STATEMENT OF THE VALUE OF HUMAN LIFE

The primary responsibility of this Department and each of its members is to protect the lives of the citizens we are sworn to serve. It is also the duty of each member of the Department to honor the established principles of democracy upon which this country was founded. Among these is the most profound reverence for human life, the value of which far exceeds that of any property. In view of this, it is essential that every action of this Department and of each of its members be consistent with that responsibility.

For these reasons, it is appropriate that this Statement on the Value of Human Life preface this Police Manual, which embodies the spirit of the Department and sets forth the principles and policies which guide the conduct of every Department employee.

In recognition, therefore, of the commitment of this Department to the preservation of human life, and because of the public trust which empowers sworn police officers to lawfully exercise force, even deadly force when required, in carrying out that commitment, it is hereby declared to be the policy of this Department that: (1) the use of deadly force shall never be condoned as a routine response, and (2) police officers shall exercise the highest degree of care in the application of such forces.

NOTE

Masculine pronouns used in this Manual include corresponding feminine pronouns unless otherwise indicated or qualified by the text.

The fact this this Department employs both male and female police officers will be clearly set out in the Manual wherever the ordinary collective wording is inapplicable or inadequate.

CONTENTS

Rule		Page
1:	Administration and Command	1
2:	Office of the Chief of Police	5
3:	Bureau of Field Operations	10
4:	Bureau of Investigation	21
5:	Bureau of Support Operations	29
6:	Bureau of Administration	39
7:	Complaint and Disciplinary Procedures	43
8:	Personnel Regulations	65
9:	General Duty Regulations	77
10:	Uniforms, Weapons, Insignia, Ceremonies	82
11:	Purchasing Regulations	91

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RULE 7

COMPLAINT AND DISCIPLINARY PROCEDURES

Section 7.001 Department Policy—The purpose of this rule is to establish a system of complaint and disciplinary procedures which will maintain the integrity of the Department by insuring a prompt and fair disposition of complaints. The procedures will subject the Department member to corrective action if improper conduct is evident, and will protect those who discharge their duties properly.

7.002 Applicability—The procedures apply to all commisioned members of the Department and, where applicable, to civilian employees.

7.003 Scope of the Rule—The provisions of this rule shall apply to complaints from the following sources:

(a) Those complaints reported to supervisory officers by members of the Department.

(b) Those resulting from observation by supervisory or commanding officers.

(c) Those made, reported, filed by private citizens or citizen groups.

(d) Those referred to the Department by any person or agency.

(e) Those uncovered during the course of a complaint investigation.

(f) Those made in lawsuits or during the course of litigation.

Section 7.004 Standards of Conduct—A member of the Department shall be subject to disciplinary action for the violation of the rules of conduct set forth by the Department as herein, for the violation of other rules and regulations set out in the Manual, for the violation of Special Orders, and for violation of the orders of a superior officer.

Every member of the Department shall, at all times, maintain reasonable standards of courtesy in their relations with the public and with other members of the Department and shall conduct themselves in such a manner that no discredit will be brought upon the Department in general or themselves in particular.

Acts contrary to good conduct shall include, but not be limited to, the following:

(a) Conviction of a felony, misdemeanor or ordinance violation under any statute or ordinance.

(b) Use of controlled substances not medicinally prescribed.

(c) Any conduct unbecoming to a member which is contrary to the good order and discipline of the Department. For example, shall include, but not be limited to:

(1) a Department member shall not withdraw or resign or absent himself from duty without leave, or fail to report for duty at his regularly appointed time;

(2) neglect of duty, improper performance of duty, sleeping or loafing while on duty to;

(3) failure to obey a reasonable order of a superior officer to;

(4) no insubordination or disrepect toward a superior officer to; and

(5) no superior shall abuse, in any manner a subordinate.

(d) Any conduct detrimental to the public peace or welfare.

(e) The drinking or alcoholic beverages of any kind, while on duty, or while in any part of the uniform which would readily identify the individual as a

member of the Metropolitan Police Department. Failure to notify supervisor or commander, when reporting for duty, or any recent use or ingestion of potentially behavior influencing prescription material or other medication.

(f) Borrowing, obtaining, receiving, soliciting or accepting any money, securities, property, or other valuable thing or any credit or guarantee of credit either directly or indirectly from any person under investigation or against whom a complaint has been made or an arrest warrant has been issued, any person in official custody or free on bond or any relatives or employees of such persons.

(g) Initiating, making, or filing a third party claim, suit, or other action arising out of work related injury, in the attempt to obtain, collect, or receive any money, securities, property, or other valuable thing from any person or company without first having notified the Department's Medical/Benefit Office.

(h) In dealing with the public - advising, procuring, or in any other manner seeking to solicit the employment of any attorney to prosecute or defend a civil suit or defend criminal proceedings.

(i) Using an official position for personal gain.

(j) When not on duty, and absent from place of residence for a period exceeding forty-eight hours without first having notified the commanding officer and provided information sufficient to permit emergency contact.

(k) Changing place of residence and/or telephone number without notifying commanding officer within twenty-four hours after the change.

(l) Soliciting or accepting the aid of any person or knowingly permitting any person to influence hiring, promotion or transfer on the member's behalf, except

by established procedures relating to request for transfer.

(m) Failing to notify unit commander prior to the appointed time to report for duty when reporting sick or injured; or when leaving place or residence or confinement while on the sick list except for medical treatment or approved therapeutic exercise. The recommendation for limited duty or rehabilitation activity must be approved by the office of the Chief of Police prior to engaging in therapeutic exercise.

(n) Failing to promptly report notification (by Healthline, St. Louis University Hospital or private physician) of one's ability to return to duty, to his commanding officer or acting commanding officer, and report at the earliest normal time that he is scheduled for duty.

(o) Feigning illness or excessive undocumented illness (outlined in the "Sick Reporting and Medical Procedure" special order) shall be subject to disciplinary action and commanding officers are held responsible for assuring that members of their command, when reporting sick are making a true report of their condition.

(p) Receiving money, gifts, gratuities, rewards or compensation for services rendered or expenses incurred, except while engaged in secondary employment, without consent of the Board.

(q) Soliciting, collecting or receiving money or other things of value for charitable, gift or testimonial purposes, while in uniform or on duty, or when representing oneself as an employee of the St. Louis Police Department, without consent of the Board.

(r) Failing upon receipt of proper notice, to attend any trial, hearing, or proceeding before a court, board, bureau or tribunal of the United States, State of Missouri, or any subdivision thereof, or City of

St. Louis, and to remain in attendance thereon until the conclusion thereof or until excused by the person causing such an appearance.

(s) Failing to devote one's time and attention to the business of the Department during scheduled duty hours; or, engaging in any other business or calling while off-duty, without first obtaining written permission from the Chief of Police to engage in secondary employment.

(t) Personal acts, or causing or procuring any person other than a licensed attorney to interfere or to intercede personally or by communication with a member of the Board or another member of the Department in one's behalf while one is under suspension or under charges; interfering with, or improper conduct with, any person who may be a witness against one while under suspension or under charges, or interfering with or improper conduct with a witness, potential witness, or one in a position to appear in any capacity in any department hearing or proceeding.

(u) The wearing of the police uniform is restricted to the service of this Department on assigned duty, or when going to or from duty, unless otherwise authorized by the Chief of Police. Permission to wear the Department's police uniform while engaged in secondary employment must be approved by the Chief of Police. Non-duty activity (e.g., menial tasks, non-emergency simple manual labor) in uniform is inconsistent with the dignity associated with the uniform and is prohibited.

(v) Any civilian member failing to immediately notify the Internal Affairs Division, or the Command Post if no one is on duty at the Internal Affairs Division, of any misconduct, physical or verbal, against any citizen by another member of the department.

(w) Any commissioned member failing to take appropriate action to prevent any misconduct, physical or verbal, against any citizen by another member of the department and then failing to immediately notify the Internal Affairs Division, or the Command Post if no one is on duty at the Internal Affairs Division, of the misconduct.

(x) Accepting anything of value for permitting/ ignoring illegal acts.

(y) Soliciting for attorneys, bondsmen, or other business persons for personal gain.

(z) Engaging in a strike, other work stoppage, work slowdown, or other job action against the Department, with the exception of non-violent, informational picketing.

(aa) Knowingly associating, on or off duty, with convicted criminals or lawbreakers under circumstances which could bring discredit upon the Department or impair an officer in the performance of his duty.

(bb) Receiving discipline, imposed as the result of complaint investigations, five (5) times in a three (3) year period.

(cc) Failing to take appropriate action on or off duty, when an incident requiring police action comes to the attention of a police officer.

(dd) Failing to conduct a proper investigation of suspected criminal activity or a non-criminal incident which requires police action.

(ee) Permitting a prisoner to escape through carelessness or neglect.

(ff) Failing to acknowledge a radio call or; to respond to a dispatched call for service.

(gg) Failing to follow radio procedure.

(hh) Suspension/revocation of driver's license; failing to notify superior/supervisor of suspension/revocation.

(ii) Failing to promptly report to the Legal Division any legal service in a lawsuit which resulted from official acts or conduct.

(jj) Engaging in any conduct or act, on or off duty, which could bring discredit upon the Department or its personnel.

(kk) Failing to properly exercise the duties and functions associated with an individual's rank or position.

(ll) Electronically recording the conversation of another Department member or a member of the public without that person's prior knowledge unless otherwise approved by other rules, regulations or special orders, or unless done in conjunction with a sanctioned investigation in which the said surreptitious recording is specifically authorized and approved in advance of the recording by the Board, the Chief of Police, a Deputy Chief or the Internal Affairs Division.

(mm) Failing or refusal to qualify with a Department owned/approved firearm.

Refer also to Rule 9: General Duty Regulations.

7.005 Political Activity—The purpose of this Rule is to set forth the permissible limits within which the members of this Department, commissioned and civilian, may participate in the elective process of any level of government and engage in political activity. It is intended to give Department members the limited right to engage in political activity consistent with the primary objective of preventing any real or apparent misuse or abuse of a posi-

tion within the Department in the area of political activities and in the exercise of the right of suffrage.

(a) Permissible Activity—

(1) All members of this Department are free to engage in political activity in the widest extent consistent with the restrictions imposed by law and Rule 7.005. Each member retains the right to:

a) register and vote in any election.

b) express his opinion as an individual on political subjects and candidates. The expression of an opinion by a Department member regarding a political candidate through the medium of distributing handbills is permitted, provided said Department member does not represent himself to be a member of the Department, any police organization or to be expressing the views of the Department as a whole; any police officer engaged in such activity must be off duty and in civilian attire.

c) display a yard sign or; on or about his person a political picture, sticker, badge or button or political symbol except during the time for which compensation is received as a member of the Department and whenever in uniform identifying him as a member of this Department;

d) participate in the non-partisan activities of a civic community, social, labor, or professional organization, or of a similar organization;

e) be a member of a political party or other political organization, and participate in its activities to the extent consistent with law and Rule 7.005;

f) attend a political convention, rally, fund-raising function, or other political gathering;

g) sign a political petition as an individual;

h) make a financial contribution to a political party or organization;

i) take an active part as an independent candidate or in support of, or opposition to, an independent candidate, in a partisan election provided that before taking any such part as aforesaid the member shall resign his position in the Department, or with the consent of the Board of Police Commissioners in its sole discretion, take a leave of absence as to the position;

j) be politically active in connection with a question which is not specifically identified with a political party, such as a constitutional amendment, referendum, approval of a municipal ordinance or any other question or issue of a similar character;

k) otherwise participate fully in public affairs, except as prohibited by law or Rule 7.012, in a manner which does not materially compromise his efficiency or integrity as a member of this Department or the neutrality, efficiency, integrity of this Department.

(2) Paragraph (a)(1) of Rule 7.005 does not authorize a member of this Department to engage in any political activity while on duty for which compensation is being paid, or while in uniform that identifies him as a member of this

Department. The Chief of Police may prohibit or limit the participation of a member or class of members of this Department in an activity permitted by said Paragraph (a)(1) if participation in the activity would interfere with the efficient performance of official duties, or create a conflict or apparent conflict of interests.

(b) Use of Official Authority. Prohibition—A member of this Department may not use his official authority, position or influence for the purpose of interfering with or affecting the result of an election.

(c) Political Management and Political Campaigning; Prohibition—

(1) A member of this Department may not take an active part in political management or in a political campaign, except as permitted in Rule 7.005.

(2) Activities prohibited by Paragraph (c)(1) of this section include but are not limited to:

a) serving as an officer of a political party, a member of a national, state or local committee of a political party, an officer or member of a committee of a political club, or being a candidate for any of these positions;

b) organizing or reorganizing a political party organization or political club;

c) directly or indirectly soliciting, receiving, collecting, handling, disbursing, or accounting for assessments, contributions, or other funds for a political purpose;

d) organizing, selling tickets to, promoting, or actively participating in a fundraising activity of a political candidate, political party or political club;

e) taking an active part in managing the political campaign of a candidate for public office or political party office;

f) becoming a candidate for, or campaigning for, an elective public office;

g) soliciting votes in support of or in opposition to a candidate for public office or political party office;

h) acting as recorder, watcher, challenger, or similar officer at the polls on behalf of a political party or candidate;

i) driving voters to the polls on behalf of a political party or candidate;

j) endorsing or opposing a candidate for public office or political party office in a political advertisement, a broadcast, campaign literature or similar material;

k) serving as a delegate, alternate or proxy to a political party or convention;

l) addressing a convention, caucus, rally or similar gathering of a political party in support of or in opposition to a candidate for public office or political party office.

(d) Determination of Questioned Activities—Appeal—

(1) A member of this Department may request, in advance, that a determination be made whether a given activity is permitted or prohibited. The request shall be made in writing and shall clearly set forth all the facts pertaining to, or connected with, activity in which the member wishes to engage. The request shall be directed to the Chief of Police (or the person designated by the Board).

(2) A written determination shall be made and delivered to the member making such request no later than thirty (30) days after receipt of such request.

(3) A member aggrieved by such a determination may appeal to the Board within ten (10) days after receipt of the determination. The appeal shall be in writing and shall clearly set forth the reason why the determination is alleged to be incorrect.

(4) The decision of the Board based on the record made in the hearing held on such appeal shall be a final decision and binding on all parties.

7.006 Complaint Defined—A complaint is defined as an allegation that a Department member has violated a Department rule or regulation, or a federal or state statute, or a city ordinance.

7.007 Procedure of Accepting Citizen Complaints

(a) A complaint may be filed in person, in writing, or by telephone to the Department, the Internal Affairs Division, or the Command Post in the office of the Chief of Police. At the time of filing the complaint, or at anytime thereafter, any citizen may be accompanied by counsel or by an interested observer to assist in the filing.

(b) Any Department member who receives a complaint from a citizen shall

(1) obtain information including the nature of the alleged violation, the name, address, and telephone number of the complainant, and the name of the Department member involved;

(2) notify his supervisor;

(3) make arrangements for the complainant to appear personally at the Internal Affairs Division. If necessary, transportation shall be provided, see (c) below;

(4) notify the Internal Affairs Division, providing the information required in (1) above. If no one is on duty in the Internal Affairs Division, the Command Post shall be notified.

(c) Whenever possible, the complainant shall be required to appear personally at the Internal Affairs Division.

(d) If it is not feasible for the complainant to personally appear at the Internal Affairs Division at the time he lodges his complaint, it shall be the responsibility of the Department member receiving the complaint to complete the "Allegation of Employee Misconduct Report." Members of the Department below the rank of sergeant shall have the report completed by their supervisor. Upon completion, this form shall be hand carried to the Internal Affairs Division. It shall be the responsibility of the Internal Affairs Division to supplement the report with any additional information when the complainant personally appears.

(e) If the complainant appears personally at the Internal Affairs Division, it shall be the responsibility of that office to complete the "Allegation of Employee Misconduct Report."

(f) Complaints received by telephone, and complaints received in writing shall be referred immediately to the Internal Affairs Division and the "Allegation of Employee Misconduct Report" shall be completed.

(g) Under no circumstances shall a telephone complaint be referred by the Department member re-

ceiving the complaint to the district where the complainant resides or to the district where the violation is alleged to have occurred.

7.008 Referral of Complaint—All complaints initiated by a citizen, or any alleged criminal violation, must be immediately referred to the Internal Affairs Division. Serious violations of departmental rules shall also be immediately referred to the Internal Affairs Division. In all instances, the "Allegation of Employee Misconduct Report" must be completed. The Internal Affairs Division shall maintain a bound ledger of these complaints, and each complaint received shall be assigned a number.

Less serious transgressions of departmental rules, or less serious complaints shall not be immediately referred to the Internal Affairs Division. Normal investigative procedures shall be followed. If the initial investigation reveals that an allegation will be made against an employee, then the "Allegation of Employee Misconduct Report" shall be prepared, with the investigating commander submitting a report and recommendations, through the proper chain of command, for final disposition.

Complaints which deal solely with differences of opinion between an officer and a citizen over the issuance of a traffic ticket, or summons, not involving an allegation of violation of departmental rules or an allegation of a law violation against the officer, nor involving an allegation such as harassment against the officer, should not be considered complaints, but rather a difference of opinion. These matters, therefore, should not be investigated nor should an "Allegation of Employee Misconduct Report" be prepared. These matters should be resolved in court. The citizen can exercise his right to challenge the traffic ticket, or summons, by appearing in court and entering a plea of "not guilty". Both the officer and the citizen will then present their respective testimony to the Judge, who will rule on the matter.

7.009 Complaints Alleging Criminal Violation—If the complaint alleges a violation of the criminal law, or if during the investigation, evidence is obtained to support a criminal violation, the Internal Affairs Division shall immediately notify the Deputy Chief, Bureau of Administration. If there is probable cause to believe that a Department member has committed a criminal violation, the Deputy Chief, Bureau of Administration shall cause a criminal investigation to be initiated.

7.010 Authority and Responsibilities—Each member of the Department shall perform the duties and assume the obligation of his rank in the investigation of complaints or allegations of misconduct. Supervisory and command personnel will themselves initiate investigations when the person complained of or observed in an infraction is within the scope of their authority.

7.011 Duties of Deputy Chief, Bureau of Administration—Complaints

(a) Upon receipt of a complaint, the Deputy Chief, Bureau of Administration may, at his discretion;

(1) refer it to an appropriate command; or

(2) make a preliminary investigation and then assign it to an appropriate command to complete the investigation based upon the preliminary; or

(3) cause an investigation of the complaint by Internal Affairs Division.

(b) The Internal Affairs Division shall have sole responsibility for proceeding with serious complaints and serious violations of Departmental rules and regulations, unless another designation of responsibility is made by the Chief of Police or Board.

(c) As indicated, the Internal Affairs Division shall complete the "Allegation of Employee Misconduct

Report" whenever a complaint is received, unless this report has previously been completed by a Department member.

(d) The Internal Affairs Division shall notify each complainant in writing that his complaint has been received and that he will be advised of the outcome in writing.

(e) The Internal Affairs Division will conduct an investigation at the request of any Department member who feels threatened by a false accusation on a contrived situation involving false evidence against the Department member. Any Department member may report such a situation directly to the Internal Affairs Division unless it involved a member of the Internal Affairs Division, in which case the Deputy Chief, Bureau of Administration will designate by whom and what manner an investigation will be conducted.

(f) Any Department member upon whom a complaint has been filed, and any Department member who has been suspended, shall be notified immediately in writing of the circumstances of the complaint and the name of the complainant, if known. The Department member's immediate supervisor will also be notified. If the nature of the complaint is such that the Department member's knowledge of same would impede the investigation, the Department member need not be notified immediately.

7.012 Power to Suspend—

The power to suspend, vested by State Statute in the Board of Police Commissioners is hereby delegated to officers of command rank, including acting command rank.

7.013 Administrative Suspension—

A member of the Department may be placed on administrative suspension if unfit for duty or when there is evidence of serious misconduct reflecting upon the integrity of the individual or the Department and the nature of the misconduct necessarily requires immediate relief from duties. Additionally, a member shall be placed on administrative suspension pursuant to the provisions of RSMo. 84.120 in the event a felony indictment is issued against the member.

Except when the administrative suspension is by the Chief of Police or the Board of Police Commissioners, it must be reported immediately to the Chief for his approval; the Chief has the authority to set aside such administrative suspension and restore the member to duty.

While under administrative suspension, a member shall surrender all Department property in his possession to his commander, upon such demand. If uniformed, the uniform or insignia of rank may not be worn. In cases where a commissioned officer owns his personal revolver, the privilege of carrying the weapon is revoked during a period of administrative suspension and the officer shall be so warned.

A member of the Department under administrative suspension shall obey all reasonable rules, regulations, and orders not in direct conflict with his rights as an accused.

A member of the Department under suspension shall receive no salary, holidays, vacation, recreation days, nor any other benefits including payment for health and life insurance premiums for the period of the suspension. However, as soon as the Chief of Police has authorized the suspension to continue, a suspended member will be allowed to make application to receive payment for accrued overtime and earned vacation days. Payments for

accrued overtime and earned vacation days will occur on the Department's regular bi-weekly pay dates and no one payment may exceed the suspended member's regular bi-weekly compensation. In addition, suspended members will be allowed to make payments for their health insurance premiums. At the conclusion of the matter the Board has the authority to order such withheld compensations restored to the member for the suspension period.

7.014 Proceedings of Administrative Suspensions Upheld by the Chief of Police—If the suspension of a commissioned member is upheld by the Chief of Police, the Deputy Chief, Bureau of Administration, shall set a date and time for a meeting of a Suspension Advisory Committee and shall notify all concerned persons. The Suspension Advisory Committee shall consist of a police officer, a sergeant and a command rank officer, and three (3) alternates of equivalent rank who shall serve for a period of four (4) months. When a Suspension Advisory Committee member is unable to attend a meeting, an alternate of equivalent rank shall serve in place. Members of the Internal Affairs Division shall not serve on the Suspension Advisory Committee, nor shall persons assigned to the same district or division as the suspended member. The Secretary to the Board of Police Commissioners shall make the appointments to the Suspension Advisory Committee from officers of the rank of police officer through lieutenant colonel and in its discretion shall appoint such additional members as are required. No officer may serve on this committee more than once in a one-year period.

The Suspension Advisory Committe shall convene no later than forty-eight hours after the original suspension. It shall be the duty and function of the committee to review the facts and circumstances giving rise to the suspension. The proceedings shall be closed and informal and the committee may call upon any department member to submit oral testimony or a written report. The suspended

member may submit any information deemed appropriate; however, he shall not be required to submit evidence directly to the committee. The suspended member may be represented by counsel if he so chooses.

Within twenty-four hours following its meeting, the committee shall submit brief written findings of fact and recommendation to the Chief. If the committee finds that there is substantial evidence of misconduct of a type which warrants relieving the member of duty, or that the member is unfit for duty, it shall recommend that the member remain in suspended status until final disposition by the Board of Police Commissioners. The committee shall consider whether continued active employment would tend to bring the Department into disrepute or would reflect discredit upon, or impair the operation of the Department. If the committee recommends that the suspension be lifted, it shall make any recommendation concerning assignment or transfer which it deems appropriate.

Upon receipt of the Suspension Advisory Committee's findings and recomendation, the Chief of Police shall within twenty-four hours either authorize the suspension to continue or make any other order deemed appropriate.

If the Chief of Police orders the suspension to remain in effect, the suspended member shall be served with charges and specifications with twenty-four hours following the Chief's order, and the Chief shall report the suspension at the next meeting of the Board of Police Commissioners.

The matter shall be set for a hearing before the Board of Police Commissioners within thirty days from the original date of the suspension. The suspended member or the Internal Affairs Division may, for good cause shown, petition the Board for a continuance. The Board of Police Commisioners shall render its order within 45 days from the time that the record of the proceedings and the proposed findings of facts and conclusion of law and the

recommendations of the hearing officer are made available to the Board. In the event the Board fails to render a decision within said 45 days, the suspended member will automatically be reinstated in an administrative capacity without police powers, unless within said 45 days the Board shall extend the period for decision for a definite time and for good cause. Both the time of the extension and the reason therefore shall be announced in writing and made available to the officer. Investigations concerning Department members under suspension shall be expedited and brought to a conclusion at the earliest possible time.

This procedure does not apply to disciplinary suspensions imposed as a result of disciplinary action ordered by the Board of Police Commissioners.

7.015 Conduct of Investigations—Preliminary Considerations—

(a) Citizen complaints reduced to writing on the "Allegation of Employee Misconduct Report" and signed by the complaint will be invesitgated. In some cases a Department member or member's supervisor may be the person making the allegation in writing. Complainants and the accused employee will be provided with a completed copy of this report.

(b) Oral complaints, anonymous telephone complaints, and unsigned letters will be referred to the Internal Affairs Division. An "Allegation of Employee Misconduct Report" will not be immediately prepared. Instead, the Internal Affairs Division will conduct a preliminary investigation to determine if there exists sufficient evidence to warrant further investigation. When such evidence, or the likelihood of a possible procedural violation is established, at that point the "Allegation of Employee Misconduct Report" will be prepared and established procedures followed in the matters of investigation, report and

recommendation. On the other hand, if the preliminary investigation reveals that the information provided by such anonymous telephone call or unsigned letter does not merit nor warrant formal investigation, the information will, with the approval of the Deputy Chief, Bureau of Administration, be filed in a pertinent information file, and no further action will be taken, unless at a later date, additional information is forthcoming to strengthen the original information and/or justify a formal investigation being conducted.

(c) If a complaint alleges a violation of the criminal law, or if during the internal investigation, evidence is obtained to support a criminal violation, the member under investigation (prior to said member being questioned) shall be immediately advised of his rights under Miranda. The member shall also be advised that he may be required to answer questions relating to his departmental duties, under penalty of dismissal or other action, even though there is a criminal aspect of the case.

If a statement is obtained after a member has been advised of and waived his rights, it shall be included in both the internal investigation report and the criminal offense report.

If a member refuses to waive his constitutional rights, he shall thereafter be advised that he must answer questions relating to his departmental duties for purposes of the internal investigation, and if he fails to do so he can be dismissed or receive other disciplinary action for failing to do so. In the event he thereafter makes a statement after refusing to waive his Miranda rights, that statement shall not be used against him in any criminal prosecution, however, the statement will be included in the internal investigative report.

* * Deletion

(d) A Department member may have counsel present when being questioned with respect to a complaint if the Department member: 1) is the subject of a written Allegation of Employee Misconduct; 2) is specifically named in a complaint and is being questioned in order to determine whether an Allegation of Employee Misconduct should be filed against him, and/or; 3) if the focus of an investigation has turned upon said Department member and consideration is being given to filing an Allegation of Employee Misconduct against said Department member.

(e) The Internal Affairs Division may require an accused Department member to submit to reasonable physical or psychological tests for purposes of determining fitness to perform duties or whether there has been a violation of rules. Such physical tests may include blood or urinalysis tests, the results of which shall be used for Department disciplinary processes only, if necessary. The accused Department member may request such tests.

(f) At any time during the course of the investigation, the Department member the complainant, the attorney for either or any community representative may submit relevant evidence to the Internal Affairs Division and such information shall become part of the investigation and shall be investigated.

(g) If a complainant withdraws his complaint, the investigating unit may, with the approval of the Deputy Chief, Bureau of Administration, cease the investigation. Reports concerning withdrawn complaints shall include the investigating officer's opinion, or the complainant's explanation for withdrawing the complaint.

(h) If the investigation reveals that the complaint was made maliciously, in bad faith, or with knowledge that the accusation was false, steps shall be

taken, whenever possible, to prosecute the complainant for making a false report of a law violation.

(i) Internal investigations shall proceed without delay, even though there is a criminal investigation or civil litigation to the case and if necessary, an offense report shall be prepared in conjunction with the investigation. If there is a pending criminal investigation or civil litigation, final reports of complaints or commencement of hearings will be delayed only at the request of the prosecutor or Board of Police Commissioners. In those cases where criminal action or civil litigation is pending the Inspector of Police, Bureau of Administration shall advise the appropriate prosecutor or Legal Division when the final report is completed and ready for submission to the Chief of Police.

(j) In the event an employee resigns/retires while under investigation, the investigative report will be completed. The report will be submitted to the Board of Police Commissioners documenting the allegations, findings and recommendation(s).

7.016 Classification of Complaint Investigation Reports—Each forwarded complaint investigative report shall specify the allegation(s) which are to be classified in one of the following five categories:

(a) *Unfounded.* The complaint was not based on fact, as shown by the investigation, or the incident complaint of did not occur.

(b) *Exonerated.* The action complained of did occur, but the investigation disclosed that the actions were reasonable, lawful and proper.

(c) *Complaint Withdrawn.* Complainant withdrew complaint.

(d) *Not Sustained.* Insufficient evidence available to either prove or disprove the allegations in the complaint.

(e) *Sustained*. Investigation disclosed sufficient evidence to support the allegations in the complaint.

In any instance when a complaint is finally disposed of as "Unfounded", "Exonerated", or "Complaint Withdrawn", all records pertaining to the complaint and its disposition shall be expunged.

7.017 Administration of Discipline—The Board has the poser and authority to discipline, for cause, any member of the Department by dismissal, suspension, reduction in rank, written reprimand, or other appropriate action.

Definitions as used in this rule:

(a) *Disciplinary Leave*—Leave without pay as the result of disciplinary action imposed by, or with the authority of, the Board of Police Commissioners. The authority imposing the disciplinary action does not deem that the complaint investigation revealed evidence of serious misconduct reflecting upon the integrity of the individual or the Department and therefore does not find it necessary to have the member surrender his/her Department weapon and badge.

(b) *Disciplinary Suspension*—Leave without pay as the result of disciplinary action imposed by, or with the authority of the Board of Police Commissioners. The authority imposing the disciplinary action deems that the complaint investigation revealed evidence of serious misconduct reflecting upon the integrity of the individual or the Department and therefore, find it necessary to have the member surrender his/her Department weapon and badge for the period of the suspension.

Included in the range of recommended disciplinary action are: reinstruction; oral reprimand; written reprimand; disciplinary leave (without pay); disciplinary suspension (without pay); reduction in rank; dismissal.

Discipline shall be administered through complaint investigations reported via administrative reports, with recommendations, except for written reprimand or lesser punishment recommended by the Department Accident Review Board.

Complaint Investigation Reports completed by Commands Other Than Internal Affairs Division

Complaint investigation reports completed by commands, other than the Internal Affairs Division will be, immediately upon completion, submitted to the Internal Affairs Division, where the reports will be reviewed for content and completeness. Prior to submitting a report to the Internal Affairs Division, commanders will confer with their Area Major/Deputy Bureau Commander and Bureau Commander concerning the report's contents. This fact will be included in the report.

The Internal Affairs Division shall return all complaint investigation reports which contain recommended discipline of reinstruction; oral reprimand; written reprimand; 1 to 15 days disciplinary leave; or 1 to 15 days disciplinary suspension to the commander of the concerned member to administer the discipline.

The Internal Affairs Division shall forward all complaint investigation reports which contain recommended discipline of 16 or more days disciplinary leave; 16 or more days disciplinary suspension; reduction in rank; or dismissal to the Chief of Police for review and recommendation. When the Chief of police has formulated his recommendation, he shall forward the complaint investigation report, along with his recommendations, to the Internal Affairs Division, through the Deputy Chief, Bureau of Administration. The Internal Affairs Division shall administer the discipline when the recommendation of the Chief of Police is 16 or more days disciplinary leave; 16 or more days disciplinary suspension; reduction

in rank; or dismissal. If the recommendation of the Chief of Police is for less than 16 days disciplinary leave or disciplinary suspension, the Internal Affairs Division shall forward the complaint investigation report to the commander of the concerned member to administer the discipline.

The Chief of Police may, at his discretion, recommend no specific disciplinary action, but recommend instead that the involved person be afforded a trial before the Board of Police Commissioners on the charge and that the Board determine the appropriate disciplinary action. The Board shall retain the prerogative of requiring the chief of Police to make a recommendation.

Complaint Investigation Reports Completed by the Internal Affairs Division

Complaint investigation reports completed by the Internal Affairs Division will be, immediately upon completion, submitted by the commander of the Internal Affairs Division to the Deputy Chief, Bureau of Administration who will review the reports for content and completeness.

The Deputy Chief, Bureau of Administration, shall return complaint investigation reports which contain recommended discipline of reinstruction; oral reprimand; written reprimand; 1 to 15 days disciplinary leave; or 1 to 15 days disciplinary suspension, to the Internal Affairs Division Commander. The Internal Affairs Division commander shall forward the complaint investigation report to the commander of the concerned member to administer the discipline.

The Deputy Chief, Bureau of Administration, shall forward complaint investigation reports which contain recommended discipline of 16 or more days disciplinary leave; 16 or more days disciplinary suspension; reduction

in rank; or dismissal to the Chief of Police for review and recommendation. When the Chief of Police has formulated his recommendation, he shall forward the complaint investigation report, along with his recommendations, to the Internal Affairs Division, through the Deputy Chief, Bureau of Administration.

If the recommendation of the Chief of Police is 16 or more days disciplinary leave; 16 or more days disciplinary suspension; reduction in rank; or dismissal, the Internal Affairs Division commander shall administer the discipline.

The Chief of Police, may at his discretion, recommend no specific disciplinary action, but recommend instead that the involved person be afforded a trial before the Board of Police Commissioners on the charge and that the Board determine the appropriate disciplinary action. The Board shall retain the prerogative of requiring the Chief of Police to make a recommendation.

ADMINISTERING DISCIPLINE

Commander of Involved Member

When the recommendation for discipline is reinstruction; oral reprimand; or written reprimand, the commander of the officer in question shall immediately notify the member, impose the discipline and document this fact in a memorandum. The memorandum, stating that the discipline has been administered, will become a part of the complaint investigation report, which shall be submitted, through the chain of command, to the Chief of Police. The Chief of Police shall forward the complaint investigation report to the Internal Affairs Division, through the Deputy Chief, Bureau of Administration.

When a recommendation is made for 1 to 15 days disciplinary leave or disciplinary suspension, the commander of the officer in question shall immediately notify the member of the recommended discipline. The member will

have five (5) working days to make a decision as to whether to accept the recommended discipline or request a Summary Hearing. The member's commander will prepare a Consent to Accept Recommended Discipline or Request for Summary Hearing form on which the member will indicate his/her option of either accepting the recommended discipline or requesting a Summary Hearing. If the member accepts the recommended discipline, his commander shall immediately administer the discipline and prepare a memorandum of this fact. The memorandum shall become a part of the complaint investigation report, which will be submitted through the chain of command to the Chief of Police. The Chief of Police shall forward the complaint investigation report to the Internal Affairs Division, through the Deputy Chief, Bureau of Administration. If the member requests a Summary Hearing his commander shall immediately notify the Internal Affairs Division that a Summary Hearing has been requested. The Internal Affairs division shall notify the Summary Hearing Board that a hearing has been requested.

Internal Affairs Division

When the proposed recommendation of the Chief of Police for discipline is 16 or more days disciplinary leave or disciplinary suspension or reduction in rank, the Internal Affairs Division shall give the member an opportunity to accept it by signing a Consent to Accept and Waiver of Hearing Form, which will become a part of the complaint investigation report. The provisions of the waiver are contingent upon subsequent approval by the Board. Whenever a member declines to accept the recommended discipline, the Board will be informed of the need for a Board Hearing.

When the proposed recommendation is for dismissal, a waiver will not be applicable and the involved member will have the option of a Board Hearing or termination of employment with the Department. When the disciplinary action is a recommendation for dismissal and the involved member rejects the option of termination, the Board will be informed of the need for a Board Hearing.

When the recommendation of the Chief of Police is that the involved person be afforded a trial before the Board to determine the appropriate disciplinary action, the Internal Affairs Division shall so notify the member. In such instances, the involved member will not be afforded the opportunity to sign a waiver, but will be served the appropriate charges and specifications in the prescribed manner.

In all discipline cases involving commissioned members of the rank of Captain or above, wherein the recommended discipline is greater than a written reprimand, and the affected member does not waive a hearing, those cases shall be referred to the Board for a hearing as outlined above.

7.018 Hearings—Under Missouri law, the Board of Police Commissioners is vested with exclusive authority to hear and render decisions at Board hearings. The Board is entitled by law to delegate the hearing authority to a non-board member.

Summary Hearings—

A Summary Hearing Board shall consist of a major (who shall be chairman of the board); one member a rank above the accused officer and one member of the same rank as the accused officer. Members of a hearing board shall be appointed by the chief of Police from a list of officers who have volunteered to serve. No officer can serve longer than six months in a calendar year. Officers assigned to the Internal Affairs Division may not serve on a Summary Hearing Board.

When the Summary Hearing Board is notified, in writing, that a member has requested a hearing, a hearing will be set within ten (10) working days.

The Summary Hearing Board may, upon application of the accused or the Department representative, postpone the hearing for good cause shown. Each side shall receive only one such continuance, which shall not exceed two (2) weeks.

The proceedings of a Summary Hearing Board will be informal, however the hearing will be electronically recorded for later transcription were it to become necessary.

The member requesting the hearing may be represented by counsel. The Department will be represented by the commander who made the initial recommendation for discipline.

The accused member and the Department representative shall present the facts of the case in their behalf. Witnesses may be heard and evidence and reports introduced and reviewed. The chairman of the board shall rule on the admissibility of evidence and testimony.

At least two (2) members of the hearing board must vote for a finding of sustaining the original allegations.

The hearing board may affirm, increase (up to a maximum of 15 days) or decrease the recommended discipline or may require that a full hearing by the Board of Police Commissioners be held.

The Summary Hearing Board shall prepare the Findings of Fact and Conclusions of Law within one (1) week after the conclusion of the hearing.

The Summary Hearing Board shall notify the accused member of its finding within seventy two (72) hours after recording its Findings of Fact and Conclusions of Law.

The findings of the Summary Hearing Board are final. There shall be no appeal within the Department.

The Summary Hearing Board shall notify the Chief of Police of its findings and conclusions.

Board Hearings—

All Hearings shall be conducted by one or more members of the Board, or by a Hearing Officer and one or more members of the Board. Hearings shall be open to the public, and shall be conducted in accordance with the provisions of Chapter 536, revised Statutes of Missouri, regarding contested cases.

The Board shall select a panel of hearing officers who shall be assigned to conduct hearings on a random basis. Hearing officers shall be practicing attorneys licensed to practice law in the State of Missouri.

At least ten days prior to time set for the hearing, a copy of the Charges and Specifications, together with a subpoena designating the time and place for hearing shall be served on the accused.

A charge is defined as a specific offense alleged to have been committed by the accused. Each distinct offense shall be the subject of a separate charge. Several charges against the same accused may be included in one paper and shall be numbered consecutively, the paper setting out the charge or charges shall be signed by the Chief of Police in the case of a Board Hearing, or by the citizen complainant, in the case of a Citizen Appeal Hearing. Each charge, with its specifications, shall be complete in itself and shall not refer, for facts or particulars, to another charge or specification.

A specification is defined as the statement of specific facts upon which a charge is based. Such statement shall be in plain and concise language, giving the name and rank of the accused, the time and place of the alleged offense and the circumstances relating hereto. The specifications shall be numbered consecutively.

In the case of a Board Hearing, no charge shall be preferred against a member of the Force unless there is good reason to believe that an offense has been committed by the accused and that it can be substantiated by evidence.

Service shall be made either by delivering such copy and subpoena to the accused in person or by leaving the same at his usual place of abode with some member of his family over the age of 15 years. If by reasonable diligence such service of the copy and subpoena cannot be made, the copy and subpoena shall be posted in a conspicuous place in the office of the unit of the Department to which the accused was last assigned.

Service may be made by any officer designated by the Chief of Police or the Board.

No accused shall be joined in the same charge or heard on joint charges with any other accused member of the Force unless for concerted action for the same offense. Each case shall be heard separately and upon its own merits.

The Board may, upon application of the accused or the complainant, postpone the hearing for good cause shown.

The Department member may be represented by counsel at no expense to the Department.

Subpoenas, when requested shall be issued to insure the presence of witnesses on behalf of the Department, the member who is charged, and the complainant.

Unless the accused's character and overall conduct are at issue and constitute the nature of the charge, the accused's service record and records of former hearings shall not be available for the hearing. However, in assessing discipline the Board may review and take into consideration the accused's service record and the proceedings in former hearings (sustained complaints only), and the Board shall make said service record a part of the official record and transcript of the hearing and shall certify to same.

If any accused member of the Force, being duly notified as provided herein, shall fail to appear for a hearing, a plea of Not Guilty shall be entered in his behalf. The Board shall then proceed summarily to hear the evidence and render judgment on the charges as the facts disclosed may warrant.

The accused shall be arraigned as to each charge in consecutive order, the presiding officer at the hearing causing each charge to be read to him and requiring him to plead Guilty or Not Guilty.

If the accused pleads Not Guilty, the witnesses for the prosecution shall first be called. The prosecution may call the Department member as a hostile witness during the prosecution's case. All the evidence for the prosecution shall be produced and presented before the prosecution rests. The accused shall then be permitted to call witnesses and present evidence in his own behalf. Evidence in rebuttal may then be introduced by the prosecution. Direct examination of each witness shall be followed by cross examination and redirect examination, if desired. The entire proceeding of the hearing will be transcribed. The Board may at its discretion, vary the order of proceedings and may reopen any issue before or after the case is closed on both sides.

If the accused pleads Guilty, the Board may receive such evidence as introduced by the accused, in mitigation of the offense charged, with the prosecution having rebuttal privileges.

At the time of the hearing, every witness, interpreter, and the stenographer reporting the proceedings, shall be sworn, taking the oaths respectively prescribed by law for each.

If the hearing is conducted by a Hearing Officer, he shall make recommended Findings of Fact and Conclusions of Law to the Board within 30 days after receiving the transcript of the proceedings.

Copies of the recommended findings of the Hearing Officer shall be provided to all parties. Upon receipt of the recommended findings, the Deputy Chief, Bureau of Administration, accused officer, and/or complainant shall have 15 days from receipt in which to file exceptions to the recommendations presented by the Hearing Officer.

If written exceptions are submitted, all parties shall be given copies of same. After review of the recommendations, submitted exceptions, if applicable, and the transcript of the proceedings, the Board shall render findings of fact and conclusions of law and enter its decision and order. The Judgment of the Board shall be final.

In the event that a Hearing Officer, for any reason, does not make recommended Findings of Fact to the Board within 30 days after receiving the transcript of the proceedings, the Board will review the transcript of the proceedings and shall render Findings of Fact and Conclusions of Law and enter its decision and order. The judgment of the Board shall be final.

An abstract of such judgment and findings shall be maintained by the Secretary to the Board. Findings of Fact and Conclusions of Law shall be prepared and provided to the accused.

7.019 Annual Summary—An annual summary of the results of complaint investigative reports shall be prepared by the Deputy Chief, Bureau of Administration, and submitted through the Chief of Police to the Board, for inclusion in the Annual Report of the Board. Such summary shall tabulate and furnish the statistical data relative to complaints received, classifications assigned, and disposition (see 2.552).

7.020 Citizen Appeals—If the proposed recommendation is that a complaint be classified "Exonerated", "Unfounded", or "Not Sustained", the complainant may, within twenty days of the mailing of the proposed recommendation, make objection in writing or by personally

appearing at the office of the Deputy Chief, Bureau of Administration.

If objection is made, the citizen shall consult with the Deputy Chief, Bureau of Administration in an attempt to reconcile any differences.

If the complainant remains unsatisfied, he may request further investigation.

The request for further investigation shall be considered an appeal by the complainant from the recommendation of the Chief of Police. This appeal shall be made in writing on a form furnished by the Department. The complainant shall state in writing any additional facts not previously submitted to the Department or not considered by the investigating unit in its investigation. Further, the complainant shall state his objections, if any, to the manner in which the complaint was investigated by the Internal Affairs Division.

The appeal and request for further investigation shall then be forwarded to the Secretary to the Board of Police Commissioners. The Secretary shall then determine whether the complainant has presented sufficient evidence not previously considered in the investigation or has shown that the complaint was not properly investigated. Should the Secretary determine that evidence necessary to prepare a complete and accurate report was not known or considered by the investigating unit or that the complaint was improperly conducted, then the Secretary shall order the Internal Affairs Division to reinvestigate the complainant's charges in light of the new evidence or inadequate report. If the Secretary determines there is no need for further investigation, the complainant shall be so notified.

The purpose of this procedure is to ensure a fair and impartial investigation of the complainant's charges based on all the information and facts known to the complainant.

7.021 Disciplinary Code—The Disciplinary Code which is contained on the following pages provides penal-

ties which are to be used when recommending or imposing disciplinary action. Penalties for manual violations not codified therein will be reprimand to dismissal.

The Board of Police Commissioners may in it's discretion increase the punishment set forth in the disciplinary code where the total disciplinary record of the accused reflects a course of conduct which has been contrary to the good order and discipline of the Department.

Revisions will be made to the Disciplinary code from time to time as the rules and regulations of the Police Manual are amended, revoked, or added to as circumstances or the good of the service may dictate.

Discipline to be imposed as the result of more than one sustained allegation shall be administered consecutively or concurrently, at the discretion of the Summary Hearing Board or the Board of Police Commissioners.

Manual/S.O. Reference	FINDING	PENALTY PROVIDED			Time Frame
		1st Offense	2nd Offense	3rd Offense	
7.004 (a)	Conviction of a Felony	Dismissal			
7.004 (a)	Conviction of a Misdemeanor	30 days to Dismissal	Dismissal		
7.004 (a)	Conviction of an Ordinance Violation	Reprimand to dismissal	30 days to dismissal		2 years
7.004 (x)	Accepting anything of value for permitting/ ignoring illegal acts	Dismissal			
7.004 (b)	Use of controlled substance not medically prescribed	Dismissal			
7.004 (c)	Intoxication—On Duty	30 days to dismissal	Dismissal		
7.004 (e)	Drinking alcoholic beverages while on duty, except within the scope of assignment	5 days to dismissal	16 days to dismissal		
7.004 (e)	Intoxication—off duty and in uniform	10 days to 30 days	30 days to dismissal	Dismissal	
7.004 (e)	Failure to notify supervisor at reporting for duty of recent use of potentially behavior influencing prescription or other medication	5 days to dismissal	10 days to dismissal	Dismissal	2 years

Manual/S.O. Reference	FINDING	PENALTY PROVIDED			
		1st Offense	2nd Offense	3rd Offense	Time Frame
7.004 (i)	Use of position for personal gain	Reprimand to dismissal			
7.004 (g)	Initiating or making/filing of claim/suit or other action, for work related injury in an effort to obtain/receive money or other item of value without notifying Personnel Section	Reprimand to 5 days	10 days to dismissal	Dismissal	
9.400	Violation of Department Firearms Policy—Improper use; handling or display of firearms	Reprimand to dismissal	15 days to dismissal	Dismissal	
7.004 (2nd paragraph)	Fighting or quarreling with Department members while either is on duty, which would bring discredit upon the Department or disrupt the work place	Reprimand to dismissal			
7.004 (y)	Soliciting for attorneys, bondsmen or other business person for personal gain	30 days to dismissal	Dismissal		2 years
7.004 (j)	Failing to provide emergency contact when off duty and away from residence in excess of 48 hours	Reprimand to 5 days	10 days to 30 days	30 days to dismissal	2 years
8.400	Feigning illness/malingering	Reprimand to 15 days	30 days to dismissal	Dismissal	

1448

7.004 (v) & (w)	Failure of any Department member to promptly report any misconduct against any citizen by another Department member or the failure of a commissioned member to take the appropriate action to prevent any misconduct	Reprimand to dismissal	15 days to dismissal	30 days to dismissal	
7.004 (l)	Offering money or other thing of value to an individual, whether a Department member or otherwise, for the purpose of directly or indirectly influencing a hiring, transfer or promotion decision	30 days to dismissal	Dismissal		
7.004 (l)	Accepting an offer, whether made by a Department member or other individual, to provide assistance in influencing a hiring, transfer or promotion decision with the knowledge that money or thing of value will be offered as inducement	30 days to dismissal	Dismissal		
S.O. 86-S-3	Violation of Department Pursuit Policy	Reprimand to dismissal	15 days to dismissal	Dismissal	2 years
7.004 (z)	Engaging in a strike, other work stoppage, work slowdown, or other job action against the Department, with the exception of non-violent informational picketing	Dismissal			
7.004 (aa)	Knowingly associating, on or off duty, with convicted criminals or lawbreakers under circumstances which could bring discredit upon the Department or impair an officer in the performance of his duty	10 days to dismissal			

1452

Manual/S.O. Reference	FINDING	PENALTY PROVIDED 1st Offense	2nd Offense	3rd Offense	Time Frame
5.250	Releasing Department records, reports or photographs without authorization	Reprimand to dismissal			
7.004 (bb)	Receiving discipline, imposed as the result of complaint investigations, 5 times within a 3 year period	5 days to dismissal			
7.004 (u)	Wearing of police uniform, or any part thereof, while off duty without authorization	Reprimand to 30 days	30 days to dismissal	Dismissal	
7.004 (p)	Receiving/soliciting money, gifts, rewards, gratuities or compensation for services rendered or expenses incurred, without Board approval, except for secondary employment	Reprimand 30 days	30 days to dismissal	Dismissal	3 years
7.004 (s)	Failure to obtain approval for secondary employment	Reprimand to 30 days	5 days to 30 days	30 days to dismissal	3 years
7.004 (t)	Interferring or interceding with a Board member; witness or potential witness; while under suspension or under charges	10 days to dismissal			
7.004 (c)	Insubordination - Disrespect to superior officer	Reprimand to 10 days	10 days to 30 days	30 days to dismissal	

146a

9.100 7.115 (h)	Failing to make required reports	Reprimand to dismissal	10 days to dismissal	30 days to dismissal	
7.004 (cc)	Failing to take appropriate action on or off duty, when an incident requiring police action comes to the attention of a police officer	Reprimand to dismissal	10 days to dismissal	30 days to dismissal	
7.004 (c)	Asleep on duty	Reprimand to dismissal	10 days to dismissal	30 days to dismissal	
7.004 (c)	Withdrawing, resigning or absenting from duty without leave	Reprimand to 5 days	5 days to 15 days	30 days to dismissal	2 years
S.O. 86-S-29	Chargeable accidents	Reprimand	1 day	2 days to 5 days	3 years
3.113 (d) 3.112	Failure to properly supervise subordinates; or to prefer disciplinary charges; or to take appropriate disciplinary action	Reprimand to demotion	10 days to demotion	Demotion or dismissal	
7.004 (c)	Failure to follow lawful order of superior officer, supervisor or commissioner (Includes written or oral orders)	Reprimand to dismissal	30 days to dismissal	Dismissal	
7.004 (dd)	Failing to conduct a proper investigation of suspected criminal activity or non-criminal incident which requires police action	Reprimand to 30 days	10 days to dismissal	30 days to dismissal	
7.004 (ee)	Permitting prisoner to escape through carelessness or neglect	Reprimand to 10 days	10 days to 30 days	30 days to dismissal	

147a

Manual/S.O. Reference	FINDING	PENALTY PROVIDED			Time Frame
		1st Offense	2nd Offense	3rd Offense	
3.115(c)	Failing to properly patrol assigned beat; loafing on duty	Reprimand to 5 days	5 days to 30 days	30 days to dismissal	
3.115(b)	Leaving assigned beat without notifying supervisor	Reprimand to 5 days	5 days to 30 days	30 days to dismissal	
7.004(ff)	Failing to acknowledge a radio call or; to respond to a dispatched call for service	Reprimand to 5 days	5 days to 30 days	30 days to dismissal	2 years
7.004(k)	Changing place of residence or telephone number without notifying commanding officer within 24 hours after change	Reprimand to 5 days	5 days to 30 days	30 days to dismissal	2 years
8.005	Violation of Department Residence Policy	Dismissal			
7.004(m)(n)(o) & 8.400	Violation of Department Sick Reporting Policy	Reprimand to 5 days	5 days to 15 days	30 days to dismissal	2 years
7.005	Violation of Department Policy related to prohibited political activity	Reprimand to 5 days	5 days to 15 days	30 days to dismissal	
Rule 10	Loss or damage to Department property through carelessness or neglect	Reprimand to 30 days			2 years
3.115(k)	Failure to follow evidence, property handling procedures	Reprimand to 5 days	10 days to 30 days	30 days to dismissal	
10.002	Violation of appearance standards—uniform or personal	Reprimand to 5 days	Reprimand to 15 days	Reprimand to 30 days	1 year

7.004(c) 3.115(d)	Failing to report for duty at appointed time	Reprimand to 5 days	Reprimand to 15 days	Reprimand to 30 days	1 year
7.004(gg)	Failing to follow radio procedure	Reprimand to 5 days	Reprimand to 15 days	Reprimand to 30 days	1 year
7.004(hh)	Suspension/revocation of drivers license; failure to notify superior/supervisor of suspension/revocation	Reprimand to 5 days	5 days to 15 days	10 days to 30 days	
9.206	Using unnecessary force in affecting an arrest, or; discourteous treatment or verbal abuse of any person or the public	Reprimand to dismissal			
7.004(ii)	Failing to promptly report to the Legal Division any legal service in a lawsuit which resulted from official acts or conduct	Reprimand to dismissal			
7.004(jj)	Engaging in any conduct or acts, on or off duty, which could bring discredit upon the Department or its personnel	Reprimand to dismissal			
7.004(c)	Superior abusing a subordinate in any manner	Reprimand to dismissal			
7.004(kk)	Failing to properly exercise the duties and functions associated with an individual's rank or position	Reprimand to dismissal	30 days to dismissal		
7.004(r)	Failing, upon receipt of proper notice, to attend any trial, hearing or proceeding or to remain in attendance until the conclusion thereof or excused.	Reprimand to 5 days	5 days to 15 days	30 days to dismissal	
7.004(mm) (89-S-1)	Unfit for Duty-Failing/Refusing Firearms Qualification	5 days to dismissal	15 days to dismissal	Dismissal	2 years

APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

92-3739

LYNN MARTIN, SECRETARY, DEPARTMENT OF LABOR,
Plaintiff-Appellee,

v.

W.E. MONKS & COMPANY and EDGAR EDWARDS,
Defendants-Appellants

United States District Court
for the Southern District of Ohio
District No. 87-00977—Holschuk, District Judge

August 3, 1993, Filed

BEFORE: MERRITT, Chief Judge, KEITH and SUHRHEINRICH, Circuit Judges.

OPINION

Defendants-Appellants, W.E. Monks & Company ("Monks") and Edgar Edwards ("Edwards"), appeal a district court judgment for the Secretary of Labor ("Secretary"), in an action brought under Section 17 of the Fair Labor Standards Act of 1938, 29 U.S.C. § 201, et seq. ("the FLSA"). For the reasons stated below, we AFFIRM the judgment of the district court.

I.

The Secretary filed this suit on August 12, 1987, against Monks and its president and majority shareholder, Edwards, for failure to pay employee overtime wages, in violation of the FLSA. The FLSA requires employers to pay their employees one and one-half their regular pay rates for overtime, defined as all hours worked in excess of 40 in a work week. See 29 U.S.C. § 207. The FLSA, however, exempts employees that are executives, administrators and professionals from its overtime provisions. See 29 U.S.C. § 213.

After a four day bench trial, the district court entered a Memorandum and Order dated June 3, 1992, in favor of the Secretary. On June 4, 1992, the court entered a judgment enjoining Monks from continued withholding of back wages in contravention of the FLSA. The court also ruled that Monks should pay $19,517.14 in unpaid overtime compensation and that Edwards was liable as an employer due to his role as Monks' president and majority shareholder. Monks and Edwards ("the defendants") filed joint appeals, raising two issues regarding the district court's judgment. These issues are discussed seriatim below.

II.

The defendants contend that the district court erred in its determination that thirteen of its employees were not salaried employees, and thus exempt from the overtime compensation provisions of the FLSA. In its Memorandum and Order, the district court summarized the evidence against the defendants as follows:

> The alleged violation at the heart of this action is improper overtime compensation of thirteen Monks employees, generating an overtime pay shortage of $19,517.14. The Secretary alleges that these draftsmen, designers, and engineers are paid regular hourly rates multiplied by their hours worked, not compen-

sated at rates for hours worked over eighty in a two-week paid period as required.

During trial of this action, the Secretary produced witnesses, including Monks' employees and U.S. Department of Labor investigator Deborah Board, to establish that thirteen Monks' employees were deprived of the full overtime compensation as provided in the FLSA. The former and current Monks' employees testified that they were never paid the statutory rate for overtime when they worked more than eighty hours in a two-week pay priod. In fact, former Monks' employee Eugene Griffin stated that, after the initial Labor Department investigation in 1986, defendant Edwards told employees to record at least forty hours in each work week, even when they did not work forty hours, and then work more than forty hours the next work week to total an even eighty hours per pay period. Employees continued to be paid "straight time," not one and one-half their "straight time" rates, for overtime work.

(Memorandum and Order at page 6-7) (citations and footnote omitted). Investigator Board reviewed payroll records, employee earnings records, and employee time sheets in reaching a determination that Monks was in violation of the FLSA's overtime compensation provisions. The Secretary alleged that the following Monks employees did not receive adequate overtime compensation: Richard Braddock ($40.80), Michael Geary ($5,128.64), Eugene Griffin ($3,672.48), Thomas Howard ($2,090.57), Adel Magaziner ($1,771.68), Laura Martino ($1,714.69), Todd Miller ($2,521.34), Todd Borton ($94.21), James Brooks ($680.57), Robert Garrity ($1,345.75), Daniel Grieshop ($354.18), George Lucas ($57.23), and Dan Milosevich ($45.00). (Memorandum and Order at page 7-6)

The defendants contend that this Court should review de novo the district court's finding regarding whether the

employees were paid on a salary basis. They rely on *Brock v. Mr. W. Fireworks, Inc.*, 814 F.2d 1042 (5th Cir. 1987), as support for this proposition. In *Brock*, the Fifth Circuit addressed the legal standards for determining employee status under the FLSA, stating that:

> The ultimate finding as to employee status is not simply a factual inference drawn from historical facts, but more accurately is a legal conclusion based on factual inferences drawn from historical facts. We thus have held repeatedly that the ultimate determination of employee status is a finding of law subject to de novo consideration by this court.

814 F.2d at 1045. The *Brock* Court went on to explain that a court's factual findings regarding employee status is subject to the clearly erroneous standard of review, while the ultimate determination of employee status is subject to plenary or de novo review. We agree with this approach and find that it is consistent with Rule 52(a) of the Federal Rules of Civil Procedure. Rule 52(a) states that "findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." Fed.R.Civ.P. 52(a).

Accordingly, we review the district court's findings of fact regarding whether the employees at issue were salaried employees under the FLSA by applying the clearly erroneous standard. We review de novo the district court's ultimate determination of whether the employees at issue were salaried employees and thus exempt from the FLSA's overtime compensation provisions.

The district court found that it was "evident from the pay records included as exhibits in this trial" that each of the employees at issue in this suit "worked more than eighty-hours in certain eighty-hour pay periods and that they were compensated at their regular rates instead of

one and one-half times those rates." (Memorandum and Order at page 8). As the district court noted, "the defendants do not dispute that the employees sometimes worked more than eighty hours in certain pay periods and that these employees were compensated for the extra hours at their regular rate." *Id.* Accordingly, the district court found that the employees at issue were not compensated at one and one-half times their regular salary for overtime work.

As a defense to the Secretary's allegations of overtime violations, the defendants contend that the employees at issue are exempt from the FLSA's overtime provisions because they are "professional" employees. The exemption of professional employees from the FLSA's overtime provisions is found at 29 U.S.C. § 213 and provides, in pertinent part, as follows:

> (a) The provisions of sections 206 and 207 of this title shall not apply with respect to—
>
> (1) any employee employed in a bona fide executive, administrative, or professional capacity, or in the capacity of outside salesmen. . . .

As the district court noted, 29 C.F.R. § 541, et seq. provides the factors to be considered when determining if an employee is a "professional" exempt from the FLSA's overtime provisions found at 29 U.S.C. § 207. (See Memorandum and Order at page 9). The district court correctly noted that when determining whether employees are "professionals" as defined under 29 C.F.R. §§ 541.311 (a) and 541.313, "at the onset of the analysis the FLSA is clear that a professional employee must be compensated on a salary or a fee basis, not hourly." *Id.* at 11 (citations omitted).

The district court concluded that the employees at issue were not salaried employees, explaining its ruling as follows:

> Evidence shows that the employees' billable work rates were based upon an annual compensation figure, what each would receive if he or she worked full-time, forty hours per week. However, testimony clearly shows that employees were never guaranteed that annual amount, barring absences of one day or more. In fact, on certain occasions, employees worked fewer than forty hours in a week and received less than a full period's pay, even if those absences were for less than one day. In short, employees might have been led to believe they would receive a certain salary amount but were not guaranteed that amount and often did not receive that amount, regardless of absences allowed under the FLSA.
>
> In fact, in an apparent attempt to compensate employees with a "regular" amount, defendant Edwards instructed employees to declare that they worked forty hours in a week on their time sheets, regardless of their actual hours worked, to receive their allotted amount of pay. However, they were told to "make up" the following week any hours that they had actually worked below forty the previous week, thereby working more than forty hours during that second week. Employees were paid for these extra hours at their hourly rates. Employees were paid less for days in which they worked less than the full day. This reduction is in direct opposition to the regulation's requirements for salary compensation. At other times, employees were instructed to assign part-day absences to vacation or sick leave time.

(Memorandum and Order at pages 13-14) (citations omitted). We find no reversible error in the court's findings that the employees at issue were not salaried employees. Additionally, we find no reversible error in the district court's ultimate conclusion that the employee's at issue were not "professionals" exempt from the FLSA's overtime provisions.

III.

Even if the employees at issue are found to be hourly employees rather than salaried employees, the defendants contend that the district court erred in its determination that the "window of correction" provision, 29 C.F.R. § 541.118(a)(6), was inapplicable in the instant case. Section 541.118(a)(6) provides, in pertinent part:

> Where a deduction not permitted by these interpretations is inadvertent, or is made for reasons other than lack of work, the exemption will not be considered to have been lost if the employer reimburses the employee for such deductions and promises to comply in the future.

The district court ruled that the "window of correction" did not apply because "there was no inadvertence" in the defendants method of paying its employees and "the employees were not salaried." (Memorandum and Order at page 16). As support for its ruling, the court cited *Martin v. Malcolm Pirnie, Inc.*, 949 F.2d 611 (2nd Cir. 1991), *cert. denied*, —— U.S. ——, 121 L. Ed. 2d 222, 1992 U.S. LEXIS 6320, 113 S. Ct. 298 (1922). We agree with the court's ruling that the "window of correction" is unavailable to the defendants. However, the court misinterprets the requirements for the applicability of the "window of correction" by construing inadvertence as a requirement of § 541.118(a)(6).[1]

The correct interpretation of § 541.118(a)(6) is stated in *Keller v. City of Columbus, Indiana*, 778 F. Supp. 1480, 30 Wage & Hour Cas. (BNA) 1095, No. IP 89-179-C (S.D. Ind. 1991), where the court wrote:

> Whether the policy allowing hourly deductions was inadvertent need not be considered. The regulation

[1] We note that the *Malcolm Pirnie* Court, like the district court in the instant case appears to have similarly misconstrued 29 C.F.R. § 541.118(a)(6). See *Malcolm Pirnie*, 949 F.2d at 615-617.

> provides that the "window of correction" option applies when a deduction is inadvertent "or is made for reasons other than lack of work." . . . In this case, the policy allowed a deduction for missing work, not because there was a lack of work. The tangential debate about whether temporal duration of the policy qualified as "inadvertent" is unnecessary.

Id. at 40. Thus, the "window of correction" applies when an employer establishes that its employees were salaried employees and that the impermissible deductions from their salaries "is inadvertent, or is made for reasons other than lack of work." 29 C.F.R. § 541.118(a)(6) (emphasis added).

In this case, the deductions were made because the employees chose to absent themselves from work, not because there was a lack of work. Making deductions for personal time absences of less than a day is not permitted under the FLSA, but is insufficient to deny the employer the exemption, provided the other requirements of § 541.118(a)(6) are met. Since the employees at issue in this case were not paid as salaried employees, § 514.118(a)(6) is not available to the defendants. See *Dole v. Walker and Armstrong*, 763 F.Supp. 1052, 1054 (D. Ariz. 1990) ("Because defendants' employees are not paid on a salary basis and thus not exempt under the Fair Labor Standards Act, there is no preservable exempt status under § 541.118(a)(6)."). Accordingly, we agree with the district court's ruling that the defendants were not entitled to a "window of correction" exemption.

IV.

For the foregoing reasons, we AFFIRM the judgment of the Honorable John D. Holschuh, United States District Judge for the Southern District of Ohio.

DISSENT BY: MERRITT

MERRITT, Chief Judge, disenting. I agree with the majority that the factual findings of the district court are to be reviewed under the clearly erroneous standard. Based on my examination of the record, I believe those findings of fact are substantially correct. However, as the majority points out, the ultimate determination as to whether the employees in question are paid on an "hourly" or "salaried" basis is a question of law, reviewable de novo. I do not agree that, under a proper application of the FLSA regulations, the district court's factual findings can support its legal conclusion that the employees in question were paid on an hourly basis. This is especially true when the "window of correction" provision, 29 C.F.R. § 541.118(a)(6), is duly applied to excuse the two instances in which employees were improperly denied full compensation for a 40-hour workweek.

Defendant Marks is a small firm. The outcome of this litigation directly affects only 13 present and former employees who worked overtime during a period of several years; four of them are entitled to less than $100 each in back pay under the majority's ruling. However, the remaining employees add to this substantially, accounting for a total of nearly $20,000 to be assessed against the defendant firm, and I believe the justifications for doing so merit greater (and more critical) scrutiny than was afforded by the majority.

The district court's opinion, quoted at some length by the majority, slip op. at ——, indicates two primary factors driving its conclusion that defendants' employees were paid on an hourly, as opposed to a salaried, basis. Defendant Edwards instructed the employees to declare on their time sheets that they worked 40 hours each week even if they actually worked fewer hours that week. Although the employees were expected to "make up" any deficit in actual hours worked by working extra hours

during subsequent weeks, those hours, if reported as hours in excess of 40, would be compensated at the computed hourly rate of each employee, over and above their normal salary for the week. I believe this factual finding works in favor of defendants, rather than against them. Defendants assured this court at oral argument that the only penalty for continued failure to report to work during the normal business hours kept by the firm is the penalty reserved for any employee in any workplace for failing to meet the expectations of the employer: the threat of dismissal. As long as the employees perform enough work over an extended period of time (billed directly through to the firm's clients on an hourly basis) to justify their salaries, all would be well. This arrangement bears a striking resemblance to a law firm in which billable hours ultimately count far more in determining an associate's worth to the firm than the number of hours spent inside the building in any particular week.

The other finding which apparently influenced the district court's conclusion regarding pay status was that employees sometimes worked fewer than 40 hours in a single week during a pay period and consequently were paid less than the "predetermined amount constituting all or part of" their compensation, 29 C.F.R. § 541.118(a). First, this finding is facially inconsistent with a policy directing employees to declare 40 hours each week regardless of actual hours worked; it would be extremely hard for the employer to simultaneously enforce both policies. Second, a careful examination of the record reveals that only six of the thirteen employees ever had their pay reduced for any reason. Of those six, four had deductions made for reasons that are fully covered and excused by the FLSA regulations. For example, George Lucas began and completed his term of employment in the middle of pay periods during which he was not employed. This policy is expressly permitted under subsection 541.118(c). He also took a week's vacation for which he had not accu-

mulated leave time, and defendants did not pay him for that week. This policy as well is expressly permitted; see subparagraph 541.118(a)(2). The isolated deductions from the paychecks of Adel Magaziner, Eugene Griffin, and Robert Garrity were similarly valid (under subparagraphs (a)(3), (a)(2), and (a)(2), respectively). Only Todd Borton and Todd Miller had deductions made that may have been violative of the regulations.

My reading of the record thus indicates violations of the regulations affecting at most two employees for a minute total of 11 hours from a period in which all employees were compensated for some 175,000+ hours, or roughly six thousandths of one percent. The "window of correction" provision, § 541.118(a)(6), is tailor-made for such a situation. The majority properly concludes that such deductions may be excused even if not inadvertent; the subsection expressly applies to deductions made for reasons other than "when there is no work available," if the employer corrects its mistake and promises to comply in the future. But the majority then totally eviscerates the provision by denying the exemption to defendants, "since the employees at issue in this case were not paid as salaried employees." Slip op. at ——. This presents a tautology from which no employer could possibly escape: The employees are not salaried because impermissible deductions were made. Those deductions are impermissible (and not excused under the "window of correction") because employees have been found to be not salaried. If, as the majority implies, the employees' deductions could be excused under the window of correction if not for the earlier finding of non-salaried status, then it follows that those deductions should not be considered in making the pay status finding.

I find no evidence of hourly pay status in the policy of declaring 40 hours per workweek regardless of actual hours worked; as I have explained, this rather leads to the contrary conclusion. Likewise, I find no inexcusable

deductions to have been made from the salaries of defendants' employees. The district court's conclusion that the employees were paid on an hourly rather than a salaried basis is therefore bereft of support. The employers in this case have done nothing which should deny them the exemption from overtime compensation provided by the Secretary's own regulations. I dissent.

APPENDIX I

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 93-3279/93-3446

ROBERT B. REICH, SECRETARY OF LABOR,
Plaintiff-Appellee
Cross-Appellant,

v.

WILLIAM G. PIERCE,
Defendant-Appellant
Cross-Appellee.

On Appeal from the United States District Court
for the Southern District of Ohio
District No. 89-00015—Sherman, Magistrate Judge

December 20, 1994, FILED

BEFORE: CELEBREZZE, KEITH, and SUHRHEINRICH, Circuit Judges.

OPINION

PER CURIAM: Defendant-Appellant, William G. Pierce ("Pierce"), appeals the district court's final judgment finding Pierce's employees were not exempt from the overtime provisions of the Fair Labor Standards Act ("FLSA") and ordering payment of overtime compensation to 17 employees. For the reasons stated below, we AFFIRM.

I. Facts

Pierce was the founder, owner, and president of Pierce Processing, Inc. ("PPI"), an Ohio engineering consulting firm which advises manufacturing companies concerning the development of new manufacturing processes or packaging concepts. The company did over one million dollars in business annually between 1986 and 1988, and Pierce controlled PPI's operations and pay policy.

PPI paid its engineers, design managers, and designers a set annual salary which could be reduced if the employees worked less than a full day. PPI deducted compensation based upon the number of hours an employee was absent from work. The company computed employees' hourly rates by dividing the agreed annual salary by 2080 (40 hours times 52 weeks), and deducted pay for hours not worked from this calculation. Additionally, the firm paid all overtime hours at a straight hourly rate, rather than at a time and a half premium. Based on the above, in June 1988, compliance officer Sara Cazel ("Cazel"), from the Department of Labor's Wage and Hour Division, investigated PPI and concluded the firm had committed overtime violations.

On January 10, 1989, the Secretary of Labor ("Secretary") brought this action against PPI and Pierce alleging intentional violations of the overtime and recordkeeping provisions of FLSA and sought a permanent injunction, unpaid overtime compensation owned the defendants' employees, and liquidated damages pursuant to 29 U.S.C. § 201 et seq. PPI and Pierce denied the Secretary's allegations and asserted the action was barred by FLSA's statute of limitations.

On October 23, 1991, pursuant to an agreement between the parties, the district court transferred the case to a United States Magistrate Judge, who conducted a

trial on February 3, 1992. On March 26, 1992, the magistrate judge concluded the defendants had not violated the recordkeeping provisions of the Act. Additionally, the magistrate determined the employees were exempt from the overtime provisions, but only so long as defendants reimbursed their employees for the deductions from their pay and promised to comply with the Act thereafter.

Five months later, the defendants had not met the requirements of the magistrate judge's decision. On November 30, 1992, the magistrate judge gave PPI and Pierce 30 days to reimburse the employees. A month later, the defendants requested an extension for reimbursement until February 1, 1993. On February 9, 1993, recognizing the defendants failed to reimburse their employees and had not promised subsequent compliance with the Act, the magistrate judge determined defendants' employees were not exempt, and ordered Pierce to pay $10,842 in back overtime wages plus interest. The magistrate judge did not grant the Secretary's request for a prospective injunction or liquidated damages. This timely appeal followed.

II. Discussion

On appeal, Pierce argues:

(1) PPI's employees are not entitled to overtime pay; and

(2) the applicability of the "window of correction" in 29 C.F.R. § 541.118(a)(6) is dependent upon his financial status.

On cross-appeal, the Secretary argues the magistrate judge improperly failed to grant a permanent injunction prohibiting Pierce from engaging in future violations.

We address each of these issues separately below.[1]

[1] We note that Pierce, proceeding pro se, cannot represent PPI. A corporation must be represented by legal counsel and cannot proceed pro se. *Doherty v. American Motors Corp.*, 729 F.2d 334, 340 (6th Cir. 1984). It is insufficient that the person attempting the representation is an officer of corporation. *Ginger v. Cohn*, 426 F.2d 1385, 1386 (6th Cir. 1970). Because Pierce is not a lawyer, has not retained counsel and is proceeding pro se, he cannot represent PPI on appeal. Accordingly, the only appellant before the court is Pierce.

A. Pierce's Employees Are Hourly Workers Entitled to Premium Overtime Pay

FLSA provides that an employer must pay each employee "at a rate not less than one and one-half times the regular rate at which he is employed" for all hours worked in excess of 40 hours a week. See 29 U.S.C. § 207(a)(1). Employers are exempt, however, from paying premium overtime rates to employees "employed in a bona fide executive, administrative, or professional capacity . . ." 29 U.S.C. § 213(a)(1). An employer need not pay the premium to an employee who qualifies as an exempt bona fide professional paid "on a salary or fee basis." 29 U.S.C. § 541.3(e). An exempt professional is paid on a salary basis if she regularly receives a predetermined amount which is not "subject to reduction because of variations in the quality or quantity of the work performed." 29 C.F.R. § 541.118(a).

FLSA only permits deductions from a salaried employee's compensation for absences of a day or more. See 29 C.F.R. § 541.118(a)(2) and (3). Employers are prohibited from deducting an exempt professional's pay for partial day absences, and such deductions are inconsistent with payment on a salary basis. "An employee who can be docked pay for missing a fraction of a workday must be considered an hourly, rather than a salaried, employee." *Martin v. Malcolm Pirnie, Inc.*, 949 F.2d 611, 615 (2d Cir. 1991), *cert. denied*, —— U.S. ——, 112 S. Ct. 298 (1992).

Recognizing this law, on appeal, Pierce:

(1) attacks the validity of the regulation prohibiting partial day absences for salaried employees; and

(2) contends the magistrate judge improperly interpreted the regulation.

First, Pierce argues the prohibition of wage deductions for partial day absences promulgated by the Department of Labor in § 541.118(a) impermissibly conflicts with congressional intent of FLSA. Pierce incorrectly argues subsequent legislation reveals congressional intent providing for compensation of hourly employees only when they perform work and flexible unpaid leave.[2] Subsequent legislation does not dismiss the regulatory exemption for salaried workers and Pierce's argument must fail.

Next, Pierce alleges the magistrate judge erroneously interpreted the meaning of the term "day" as used in 29 C.F.R. § 541.118(a)(2). According to Pierce, because a "day" actually means less than a full, eight hour, working day, partial day absences constitute a "day" under the regulations. Thus, he properly docked employees' pay for missing a "day." We summarily reject Pierce's argument and find that for the purposes of 29 C.F.R. § 541.118 (a)(2) and (3), a working day constitutes the standard, eight-hour working day.

Rejecting the validity of Pierce's arguments, we find Pierce's employees are hourly workers entitled to premium pay and did not fall under the salaried exemption. The engineers, design managers, and designers did not qualify for exempt salaried professional status, because their compensation was subject to reduction because of the variations in the quantity of hours worked. These deductions did not result from absences of a day or more, but rather were for partial days. Because Pierce's employees were docked pay for missing a fraction of a workday, they cannot be considered salaried employees exempt from overtime compensation, but rather hourly workers entitled to overtime pay at one and a half times premium. Here,

[2] Pierce cites FLSA Amendments of 1947, 29 U.S.C. § 251 *et seq.* and the Family and Medical Leave Act of 1993, 29 U.S.C. § 2601 *et seq.*

PPI failed to pay each employee at a premium rate for overtime. This failure violated FLSA.

B. The Applicability of the "Window of Correction" in 29 C.F.R. § 541.118(a)(6) is Dependant Upon Pierce's Financial Status

Pierce next argues the application of the "window of correction" exception should not turn upon his ability to reimburse docked employees. As noted above, the magistrate judge initially applied the "window of correction," allowing PPI to maintain the salaried, exempt from overtime status of certain employees. The magistrate judge conditioned the application of the "window of correction" upon Pierce's reimbursement of employees for past deductions and Pierce's promise of subsequent compliance. After Pierce's continued failure to reimburse the employees and to promise future compliance wtih the Act, the magistrate judge concluded PPI's employees were not exempt from the overtime provisions and ordered Pierce to pay overtime compensation for the entire period from January 9, 1987 to December 31, 1988.

Pierce claims his financial inability excuses his failure to reimburse the past deductions. Pierce proposes that the "window of correction" maintaining salaried, exempt from overtime status, should be removed only if an employer is financially able to repay deductions but refuses to do so. Pierce argues the magistrate judge erroneously removed the "window of correction" because he was financially unable to repay the deductions. We disagree.

FLSA provides that:

> . . . where a deduction not permitted by these interpretations is inadvertent . . . the exemption will not be considered to have been lost if the employer reimburses the employee for such deductions and promises to comply in the future.

29 C.F.R. § 541.118(a)(6). The window of correction essentially allows "employers to treat otherwise eligible

employees as salaried regardless of the employer's one-time or unintentional failure to adhere to § 541.118(a)'s requirements." *Martin*, 949 F.2d at 616. Here, pursuant to the window of correction, the magistrate judge did not initially find exemption status had been lost on March 26, 1992. The magistrate judge, however, pursuant to the regulation, conditioned the finding on PPI's reimbursement of employees for deductions and promise of future compliance. Almost one year later, after Pierce had satisfied neither condition, the magistrate judge considered the salaried, overtime exemption status lost and ordered Pierce to pay those employees overtime pay. Contrary to Pierce's claims, the regulation provides for no extension of exempt status due to inability to pay. Even had such a provision existed, Pierce provided no evidence supporting his inability to repay the deductions. We therefore find the magistrate judge correctly removed the "window of correction" and ordered PPI to pay overtime rates.

C. The Magistrate Did Not Abuse His Discretion By Refusing to Grant a Permanent Injunction

On cross-appeal, the Secretary argues the magistrate judge improperly failed to grant a permanent injunction prohibiting Pierce from engaging in future violations. We disagree.

Although courts may enjoin violations of the overtime provisions of FLSA, 29 U.S.C. § 217, the imposition of an injunction under FLSA lies within the discretion of the trial judge. *Martin v. Funtime, Inc.*, 963 F.2d 110, 113 (6th Cir. 1992); *Wirtz v. Flame Coal Co.*, 321 F.2d 558, 560 (6th Cir. 1963). While we recognize the important purposes of FLSA compliance and PPI's failure to adhere to the magistrate judge's past orders, we cannot find the magistrate judge abused his discretion by not issuing a prospective injunction.

III. Conclusion

For the foregoing reasons, we find the magistrate judge properly determined Pierce's employees were not exempt from the overtime provisions of FLSA and ordered Pierce to pay overtime compensation. Additionally, the magistrate judge did not abuse his discretion denying the Secretary's request for injunctive relief. Therefore, we AFFIRM the final judgment of the Honorable Jack Sherman, Jr., United States Magistrate Judge for the Southern District of Ohio, Western Division.

APPENDIX J

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 94-2094

URSULA BENNETT, RONALD L. CHAVEZ, LARRY COOK, DONALD CRUTCHFIELD, RICHARD FUSCO, DIANE GUTIERREZ, DAVID IVERSON, HERMAN E. IVORY, MICHAEL MAESTAS, FELIMON MARTINEZ,) GREG MARTINEZ, CHARLES MELTON, STEVE V. MORA, RAMON ORDONEZ, MARY ELLEN ORTIZ, JOHN VAN SICKLER, MIKE SISNEROS, GRACE VALENCIA, VIKY WOODWORTH, BILLY ZAMORA,

Plaintiffs-Appellees,

v.

ALBUQUERQUE, CITY OF,
Defendant-Appellant,

and

ARTHUR BLUMENFELD, Chief Administrative Officer, individually and in his official capacity; RALPH RUIZ, former Director of the Department of Corrections, individually and in his official capacity; EARL C. WAID, Director of the Department of Corrections, individually and in his official capacity; ROBERT BROWN, Director of Employee Relations Department, individually) and in his official capacity,

Defendants.

(D.C. No. CIV-92-1029-WWD/DJS). (D. N.M.)

April 18, 1995, Filed

Before MOORE, BARRETT, and EBEL, Circuit Judges.

Opinion

By: DAVID M. EBEL

ORDER AND JUDGMENT *

This is an action brought under the Fair Labor Standards Act (FLSA).[1] Plaintiffs, all current or former employees of the City of Albuquerque, filed suit against the City to recover past due overtime compensation. In response, the City argued plaintiffs were not entitled to coverage because they hold exempt management positions.[2] Following a three-day bench trial, the district court rejected the City's argument and awarded damages in the form of past due overtime wages.[3] The City now appeals, challenging both the finding that the exemption is inapplicable and the magistrate judge's calculation of damages.

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of the court's General Order filed November 29, 1993. 151 F.R.D. 470.

[1] After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed.R.App.P. 34(a); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

[2] Although certain plaintiffs are no longer working at the detention center, the majority have retained their positions. Consequently, we will refer to the positions in the present tense.

[3] The parties agreed to proceed before a magistrate judge pursuant to 28 U.S.C. 636(c)(1).

I. Facts

Plaintiffs work at the Bernallilo County Detention Center in Albuquerque. The center is a prison facility housing approximately 800 inmates. It is comprised of two distinct towers and a booking area. Three types of employees staff the facility. Corrections officers are the most numerous. They are assigned to a designated area during each shift and are responsible for maintaining security and safety in that area. In addition, three or four lieutenants are assigned to rove the floors in each tower. They supervise and help the corrections officers when necessary. Finally, each shift has one captain who is in charge. Plaintiffs are lieutenants and captains at the facility.

The center operates on a twenty-four hour basis in three eight-hour shifts. During each shift, all employees are entitled to a one-half hour meal break, which historically has been considered paid time. It is undisputed that supervisors are on call during this break. Several plaintiffs testified they are often called away while eating to respond to center matters. They also stated they generally may not leave the facility and often catch up on paperwork during this period. In addition, plaintiffs are required to report to work thirty minutes before their scheduled shift begins. This is not considered paid time. The parties testified, however, that it is necessary to the efficient operation of the prison and allows a smooth transition between shifts.

Historically, supervisors at the detention center were paid overtime in the same manner as the corrections officers working under them. At some time following application of the FLSA to public employees, however, the City altered its overtime policy slightly and established a system whereby supervisors were eligible for "premium pay." This policy was, in most respects, the same as the previous overtime scheme. City representatives testified at trial that they thought premium pay was necessary to attract and keep qualified officers.

In 1988, several detention center employees went to the Albuquerque city council to express their concern over the working conditions and employment practices at the prison. In response, the City formed a task force to evaluate the various employee positions at the center. The task force determined that the positions of lieutenant and captain, then referred to as corrections supervisor and corrections facility supervisor, needed to be upgraded to reflect the additional responsibilities involved in those positions. The recommendations of the task force were accepted and the positions were upgraded so that more pay was available. Following this change, the lieutenants and captains continued to receive premium pay.

In 1990, an internal payroll audit was conducted, in large part due to citywide budget shortfalls. As a result of that audit, the City decided to end the practice of giving premium pay to lieutenants and captains. The City considered those positions management and concluded overtime was not required under the FLSA. Thus, starting in August of 1990 the lieutenants and captains no longer received any form of overtime compensation. They filed this lawsuit to recoup the resulting lost wages.

II. Discussion

A. Background

At the time the FLSA was enacted in 1938, it did not apply to state and local government employees. *See Lamon v. City of Shawnee*, 972 F.2d 1145, 1149-50 (10th Cir. 1992) (discussing history of the FLSA and its application to public sector employees), *cert. denied*, 122 L. Ed. 2d 785, 113 S. Ct. 1414 (1993); *see also* 57 Fed. Reg. 37,666-68 (1992) (same). It was not until 1986 that FLSA coverage was extended to the public sector. *See generally Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 533-34, 557, 83 L. Ed. 2d 1016, 105 S. Ct. 1005 (1985) (overruling *National League of Cities v. Usery*, which rejected application of FLSA to public sector). Only then did Congress, the courts, and

the Department of Labor (DOL) begin the process of integrating public sector employment issues into the well established regulatory scheme of the FLSA. In this case, we are called upon to undertake that task again.

The magistrate judge held plaintiffs are not exempt under the "bona fide executive" exception to the FLSA. As a result, he concluded they are entitled to overtime compensation under the Act. In calculating the appropriate damages, he found plaintiffs must be paid for their meal break because they are, in effect, on duty during that time. As a consequence of that finding, he determined the half-hour briefing period required at the beginning of each shift is essentially uncompensated overtime. The magistrate used the briefing time as a basis for awarding damages. He rejected the City's argument that the appropriate method for calculating any overtime is on a twenty-eight day cycle, rather than a weekly one. The City challenges each of these findings. We address them in turn.

Our standard of review is well settled. "We review the district court's factual findings under the clearly erroneous standard, and its ultimate conclusion that the captains [and lieutenants] were not exempt employees de novo." *Department of Labor v. City of Sapulpa*, 30 F.3d 1285, 1287 (10th Cir. 1994). As a substantive matter, the City has the burden of proving the exemption applies. *Id.* The plaintiffs must fit "plainly and unmistakenly" within the exemption's terms. *Reich v. Wyoming*, 993 F.2d 739, 741 (10th Cir. 1993) (citing *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392, 4 L. Ed. 2d 393, 80 S. Ct. 453 (1960)).

B. The Bona Fide Executive Exemption

When the FLSA was enacted, Congress included a provision requiring employers to pay overtime wages in an amount of one and one-half times the regular hourly rate of pay for employees working over forty hours a

week. 29 U.S.C. 207(a)(1). Exempt from this provision, however, were workers performing in a "bona fide executive, administrative, or professional capacity." 29 U.S.C. 213(a)(1).

Regulations accompanying the Act define this management exemption in some detail. See 29 C.F.R. 541.1(a)-(f). The bona fide executive is an employee

> who is compensated on a salary basis at a rate of not less than $250 per week . . . and whose primary duty consists of the management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof, and includes the customary and regular direction of the work of two or more other employees. . . .

29 C.F.R. 541.1(f). Here, there is no dispute that the plaintiffs earn over $250.00 per week. Therefore, we focus our examination on whether the plaintiffs are paid on a salary basis and whether their primary duties involve management. *See Hilbert v. District of Columbia*, 23 F.3d 429, 431 (D.C. Cir. 1994). The district court determined they met neither test.

1. The Salary Test

The regulations accompanying the FLSA define the scope of the salary basis test. Section 541.118(a) states an employee will be considered to be paid "on a salary basis" within the meaning of the regulations if under his employment agreement he regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed. 29 C.F.R. 541.118(a).

Relying on this definition of the salaried employee, some courts have held that any policy which requires reductions

in pay for absences less than a day[4] is repugnant to the concept of salary basis. Thus, if the public entity allows partial day docking, the employee is not, by definition, salaried. As a consequence, the exemption cannot apply. *See, e.g., Kinney v. District of Columbia*, 994 F.2d 6, 11 (D.C. Cir. 1993); *Michigan Ass'n of Governmental Employees v. Michigan Dep't of Corrections*, 992 F.2d 82, 86 (6th Cir. 1993); *Abshire v. County of Kern*, 908 F.2d 483, 486-87 (9th Cir. 1990), *cert. denied*, 498 U.S. 1068, 112 L. Ed. 2d 848, 111 S. Ct. 785 (1991).

Here, the district court found plaintiffs were not paid on a salary basis because "the compensation [they receive] is directly or indirectly subject to deduction for less than one day's absence from work." Appellant's App. Vol. I doc. 14 at 2. While it is true that certain employees testified they had to use accrued benefits, such as vacation or sick time, to cover absences less than a day, there was no evidence of a policy to decrease the actual amount of pay received based on those absences. In fact, the testimony was that the City did not dock pay. See Appellant's App. Vol. III doc. 19 at 76-77, 149-50.

Section 541.118(a) is very specific. It speaks of deductions in the amount of compensation as being contrary to the salary test. It does not exclude from salaried status those employees who must use accrued benefits to cover partial day absences from work. Absent a specific policy to reduce the amount of pay, as opposed to reductions in accrued benefits, there is no violence done to the salary basis concept. *Barner v. City of Novato*, 17 F.3d 1256, 1261-62 (9th Cir. 1994). We agree with the court in *Barner* that a policy requiring public employees to reduce leave for partial day absences does not offend the salary basis test. The district court erred when it found otherwise. The City points out—and Plaintiffs do not contest—that captains and lieutenants were paid

[4] We find no allegations of docking for absences of greater than one day, in which case a distinction is drawn between different types of absences. See generally 29 C.F.R. 541.118(a).

a regular biweekly amount in excess of $250 per week. Because this regular amount was not subject to reductions in pay, we hold that Plaintiffs were salaried.[5]

This does not, however, end our inquiry regarding application of the executive exemption. The district court also held plaintiffs do not qualify as management employees under the duties test. In light of our conclusion that the district court erred when it held plaintiffs failed the salary test as a matter of law, we also consider the City's claims with regard to the second prong of the exemption.

2. The Duties Test

The second component of the executive exemption is the duties test. Under the DOL's regulations, this aspect of the exemption is satisfied if the primary duty of the employee is management. Indicia of management are, among other things, directing the work of others, appraising productivity, recommending promotions, handling complaints and grievances, and providing for the safety of employees. 29 C.F.R. 541.102(b); *City of Sapulpa*, 30 F.3d at 1287 (listing management duties). Throughout this litigation, the parties' dispute has focused on the plaintiffs' duties and how they spend their time during work hours.

[5] In light of this disposition—that the employees in question are not disqualified from exempt status solely based upon the City's practice of docking accrued benefits—we need not reach the other argument advanced by the City, that docking cannot preclude salaried status for public employees because of the principles of public accountability. In particular, we need not consider the DOL's rejection of this portion of the salary test for public employees beginning in August of 1992, or whether the test was valid prior to that time. *See Service Employees Int'l Union Local 102 v. County of San Diego*, 35 F.3d 483, 489 (9th Cir. 1994); see also 29 C.F.R. 541.5d(a) (directing that public employees who otherwise meet the salary test should not be disqualified from exempt status simply because they are paid under a system which takes into account principles of public accountability).

The plaintiff-lieutenants testified they spend approximately forty to sixty-five percent of their time performing nonmanagement functions. During that time they are doing the same work as the corrections officers, who are covered FLSA employees. The captains testified that although they spend only fifteen to twenty percent of their time performing the duties of a corrections officer, they also spend fifty percent of their time doing data entry, which they submit is purely clerical.

The determination whether an employee's duties are primarily management oriented is fact driven. *City of Sapulpa*, 30 F.3d at 1287. Where the evidence shows the employee spends over fifty percent of his or her time performing activities which are considered management, however, that will be considered the employee's primary duty. 29 C.F.R. 541.103. Alternatively, if the facts indicate an employee does not spend fifty percent of his or her time performing management functions, the employee may still fall within the exemption if he or she meets other criteria. *Id.* The additional criteria are the relative importance of the managerial duties as compared with other types of duties, the frequency with which the employee exercises discretionary powers, his relative freedom from supervision, and the relationship between his salary and the wages paid other employees for the kind of nonexempt work performed by the supervisor. 29 C.F.R. 541.103. The record reveals there was evidence submitted on each of these factors during trial.

Despite the parties' focus on the nature of plaintiffs' duties, the district court's findings of fact and conclusions of law do not reflect a considered analysis of these four supplemental factors. Indeed, it appears the court relied only on the discretionary authority factor when evaluating plaintiffs' primary duties. This was legal error. Therefore, we must remand with directions that the court make specific findings and legal conclusions using the appropriate standard.

Because we are remanding this matter to the district court for proper application of the law and regulations governing the bona fide executive exemption, we turn to the challenges the City has made to the court's damage calculations. If the court determines on remand that the exemption does not apply, these issues will still be relevant. The corollary issues are 1) whether the court erred in finding Plaintiffs' mealtimes compensable, and 2) whether the district court erred in failing to apply the twenty-eight day "tour of duty" rule for measuring overtime damages.

C. Compensability of Meal Time

The district court ruled plaintiffs should be compensated during their half-hour meal break. Specifically, the magistrate judge held the captains and lieutenants are "under such restrictions as to their movement and availability that the one-half hour lunch period should be considered as compensable time." Appellant's App. Vol. I doc. 14 at 3. Thus, Plaintiffs worked one-half hour during the pre-shift briefing period,[6] one-half hour during the lunch period, and seven and one-half hours during their regular shift, for a total of eight and one-half compensable hours per day. The magistrate judge used this eight and one-half hour figure to calculate damages.

"[A] police officer must primarily be engaged in work-related duties during meal periods to warrant compensation therefor." *Lamon*, 972 F.2d at 1157; see also 29 C.F.R. 785.19; 553.223(b).[7] Here, the evidence shows

[6] This is undisputed by the City.

[7] The *Lamon* court discussed this issue using the standards set forth in the regulations governing the twenty-eight day tour of duty exception. See 972 F.2d at 1155-58. As we note in part D, infra, it is unclear at this juncture whether that exception applies here. There is nothing in the record or the briefs, however, suggesting the regulations governing the forty hour work week would direct a different result under the facts presented here. See id. at 1158 n.18.

plaintiffs are on call during their lunch and may not leave the facility except under very limited circumstances. Plaintiffs testified their meal period is disrupted on a regular basis because they are needed elsewhere in the prison. These are factual findings which are not clearly erroneous. Consequently, we affirm the district court's decision on this issue.

D. Tour of Duty Exception

Although private sector employers must generally compensate employees for time spent over forty hours in a week, government entities employing law enforcement personnel are not so restricted.[8] The tour of duty, or "7(k)," exception allows employers to alter overtime standards for law enforcement personnel who work on alternative cycles of between seven and twenty-eight days. *See Birdwell v. City of Gadsden*, 970 F.2d 802, 805 (11th Cir. 1992). Under 29 U.S.C. 207(k)

> No public agency shall be deemed to have violated subsection (a) of this section with respect to the employment of any employee in . . . law enforcement activities . . . if—
>
> . . . .
>
> (2) in the case of such an employee to whom a work period of at least 7 but less than 28 days applies, in his work period the employee receives for tours of duty which in the aggregate exceed a number of hours which bears the same ratio to the number of consecutive days in his work period as 216 hours (or if lower, the number of hours referred to in clause (B) of paragraph (1)) bears to 28 days, compensation at a rate not less than one and one-half times the regular rate at which he is employed.

[8] There appears to be no dispute that plaintiffs are law enforcement personnel. *See Avery v. City of Talladega*, 24 F.3d 1337, 1342-43 (11th Cir. 1994) (jailers at corrections center are law enforcement personnel under the FLSA).

The DOL regulations specify that law enforcement personnel may not work more than 171 hours in a twenty-eight day period without receiving overtime. 29 C.F.R. 553.201(a). Thus, anything over that amount is subject to a rate of one and one-half times the usual hourly pay.

It is undisputed that the City, through an interoffice memorandum from the Director of Corrections, adopted a twenty-eight day tour of duty standard on October 12, 1985. Appellant's App. Vol. III doc. 23. In addition, trial evidence reveals plaintiffs work on a seven-day calendar. See Appellees' App. at 1-134. The magistrate judge ruled, however, that the City's failure to implement a twenty-eight day wage and overtime schedule was fatal to its attempt to exercise any rights it had under 207(k). Inherent in this conclusion, however, is an assumption that the section requires employers to conform pay periods to match a twenty-eight day cycle. We must disagree with that conclusion.

A public employer need not structure its pay periods on a twenty-eight day basis to take advantage of the 7(k) exception. *Lamon*, 972 F.2d at 1151; see also 29 C.F.R. 553.224(a). Indeed, "other than adopting a specified work period, the employer is not required to restructure its overtime payment practices whatsoever; the employer has the option to do so." *Lamon*, 972 F.2d at 1152 (emphasis added). This court has rejected the argument that a public employer must make wholesale changes in its wage and hour practices to take advantage of the section. *Id.* ("That the measure affected little change does not render it a fiction."). The magistrate judge erred when he held otherwise.

Plaintiffs argue *Lamon* is distinguishable from this case because execution of an interoffice memorandum is insufficient to exercise 7(k) rights. In *Lamon*, the policy was made part of an administrative code. There is no language in Lamon, however, suggesting that incorporation in a city code is essential to effectuating the exception.

To the contrary, it is enough that the tour of duty exception be adopted as city policy. *See McGrath v. City of Philadelphia*, 864 F. Supp. 466, 476 (E.D. Pa. 1994) ("The 'establishment' of a 7(k) work period may be manifested by an appropriate public declaration of intent to adopt a work period of between 7 and 28 days.").

Here, both the district court's findings and the record are unclear as to whether the memo constituted city policy.[9] Plaintiffs have not argued, however, that the document is a sham, and it is undisputed that the memo came from, and was distributed to, the appropriate corrections facility personnel.[10] See *Lamon*, 972 F.2d at 1152 (noting that employer may not impose "sham changes" in scheduling and employment policies to evade the Act). Therefore, if the City can show this memorandum was made part of its wage and hour employment policy, it will be sufficient to invoke 7(k) rights.

Because both the record and the magistrate judge's order are unclear on whether this memorandum constituted city policy, however, we must remand for further factual findings on this question. If the memo did result

[9] The district court found that the memo "was never implemented in such a way as to cause hours for employees of Bernalillo County Detention Center to be computed on a 28 day 'tour of duty' basis." Aplt. App. at 97, P13. This language could be interpreted as a finding that 1) the legislature never adopted the memo, 2) the memo did not propose a 28 day schedule for actual payments, or 3) the city never effectively made the memo part of its wage and hour employment policy. Only the third alternative would preclude the City's invocation of the tour of duty exception.

[10] Plaintiffs suggest in their brief that the magistrate judge's order means other than what it says. They state that "the Magistrate Judge could have concluded that the [tour of duty] memo represented a policy which had been superseded long before Workers' claims arose." Appellees' Br. at 21. This is pure speculation, and we will not presume to know the magistrate's thinking on this issue. *See G.J.B. & Assocs., Inc. v. Singleton*, 913 F.2d 824, 831 (10th Cir. 1990) (appellate court should not second guess at the meaning of the district court's order).

in a policy change, the City is entitled to judgment as a matter of law on this issue.

In light of our disposition on these challenges to the district court's order, we need not address the City's remaining argument that there was insufficient evidence of damages. If plaintiffs prevail on remand, the magistrate judge should recalculate any damages using the standards we have announced here. In particular, if necessary, the magistrate judge should alter any award to reflect that certain plaintiffs ceased working for the City before or during this litigation. See Appellees' Br. at 23 (admission that magistrate judge erred in awarding full damages to plaintiffs no longer working for the City).

The judgment of the United States District Court for the District of New Mexico is AFFIRMED in part, REVERSED in part, and REMANDED for further proceedings consistent with this order and judgment.

Entered for the Court

David M. Ebel
Circuit Judge

APPENDIX K

DEPARTMENT OF LABOR

Employment Standards Administration
Wage and Hour Division

29 CFR Part 541
57 FR 37666
August 19, 1992

Exemptions From Minimum Wage and Overtime Compensation Requirements of the Fair Labor Standards Act; Public Sector Employers

AGENCY: Wage and Hour Division. Employment Standards Administration. Labor.

ACTION: Final rule.

SUMMARY: This document provides revised final Regulations, 29 CFR part 541, governing the criteria for exemption from the minimum wage and overtime compensation requirements of the Fair Labor Standards Act ("FLSA" or "Act") for public sector employees employed in *bona fide* executive, administrative, and professional capacities. A special, limited exception from the exemption's requirement for payment "on a salary basis" is provided for certain public sector pay systems that reduce the pay of otherwise-exempt employees for partial-day absences when paid leave is not used to cover such absences, and for deductions due to budget-required furloughs.

EFFECTIVE DATE: September 18, 1992.

* * * *

II. Background

A. Summary of Statutory and Regulatory Provisions

The FLSA (29 U.S.C. 201, *et seq.*) requires that covered, non-exempt employees receive not less than the Federal minimum wage for all hours worked and overtime premium pay (at one-and-one-half times the regular rate

of pay) for all hours worked over 40 in a workweek. Section 13(a)(1) of the Act (29 U.S.C. 213(a)(1)) provides a statutory exemption from these requirements for employees employed in a *bona fide* executive, administrative, or professional capacity, as follows:

Section 13. (a) The provisions of sections 6 (except section 6(d) in the case of paragraph (1) of this subsection) and 7 shall not apply with respect to—

(1) any employee employed in a bona fide executive, administrative, or professional capacity (including any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools), or in the capacity of outside salesman (as much terms are defined and delimited from time to time by regulations of the Secretary, subject to the provisions of the Administrative Procedure Act * * *).

The scope of the exemption provided by Section 13(a)(1) of the FLSA is defined and explained in Department of Labor regulations, codified at 29 CFR part 541. The regulations generally require that, to be exempt, employees must meet specified regulatory standards with respect to their job duties and responsibilities, and be compensated "on a salary basis" at a level that is not less than the stated amounts.[1]

Employees whose terms and conditions of employment meet the stated exemption requirements need not be paid the FLSA minimum wage or overtime premium pay for hours worked over 40 per week.

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[1] The existing exemption criteria include specified duties and responsibilities tests, in addition to a salary requirement. To qualify, an employee must be paid a weekly salary of a least $155 as an executive or administrative employee, and $170 as a professional, and must meet all the other tests (the "long tests" for exemption). If such employees receive $250 (or more) in salary, a shorter, less-stringent duties test applies (the "short test" or "upset salary test"). Consideration of these compensation levels will be undertaken in connection with any further rulemaking.

The regulations defining "salary basis" (at § 541.118) provide that an employee will be considered to be paid "on a salary basis" if the employee regularly receives each pay period a predetermined amount constituting all or part of the employee's compensation and the predetermined amount is not subject to reduction because of variations in the quality or quantity of work performed. Subject to specified exceptions, the employee must receive the full salary for any week in which any work is performed without regard to the number of days or hours worked, subject also to the general rule that an employee need not be paid for any workweek in which no work is performed.

Deductions may not be made " * * * for absences occasioned by the employer or by the operating requirements of the business," such as "deductions * * * for time when work is not available" (§ 541.118(a)(1)). Deductions also may not be made for activities such as jury duty, attendance as a witness, or temporary military leave (§ 541.118(a)(4)).

Deductions may be made from an employee's predetermined compensation without invalidating the employee's salaried status when an employee is absent from work for a full day or more for personal reasons, other than sickness or accident, as provided in § 541.118 (a)(2). Deductions are also permitted for absences of a day or more because of sickness or disability if the employer has a *bona fide* plan, policy or practice that provides compensation for loss of salary due to sickness and disability (§541.118(a)(3)). Deductions imposed "in good faith for infractions of safety rules of major significance" also will not affect an employee's salaried status (§ 541.118(a)(5)).

The regulations also state that the effect on the salaried status of an employee, and thus eligibility for exemption, when an impermissible deduction is made will depend upon the facts in each case. This provision permits an employer who makes impermissible deductions from the

predetermined compensation of an otherwise salaried employee to reimburse the employee for the deductions in certain circumstances, thereby restoring the exempt status of the employee. In particular, § 541.118(a)(6) provides:

> (6) The effect of making a deduction which is not permitted under these interpretations will depend upon the facts in the particular case. Where deductions are generally made when there is no work available, it indicates that there was no intention to pay the employee on a salary basis. In such a case the exemption would not be applicable * * * during the entire period when such deductions were being made. On the other hand, where a deduction not permitted by these interpretations is inadvertent, or is made for reasons other than lack of work, the exemption will not be considered to have been lost if the employer reimburses the employee for such deductions and promises to comply in the future.

The salary requirement has been an integral part of the 541 regulations since 1940. The existing regulatory interpretation of "salary basis" dates back to 1954 (19 FR 4405; July 17, 1954). These provisions were developed from extensive hearings and record evidence showing that executive, administrative, and professional employees employed in industries then-subject to the FLSA, which excluded governmental employers, were nearly universally paid on a salary basis. Employers not compensating on a salary basis have had ample opportunity to conform their pay practices to the requirements if they chose to claim exemption for their employees, or pay overtime premium pay. In contrast, the public sector pay policies at issue in this rulemaking evolved over the years subject to constraints in statutes, ordinances or policies based on public accountability principles that preclude paying public employees for hours not worked, under systems that regarded management employees as being exempt from overtime.

B. Legislative History of the FLSA in the Public Sector

Since FLSA was enacted in 1938, the Congress and the U.S. Supreme Court have periodically acknowledged the special circumstances of, and different treatment to be accorded to, governmental employers and employees under the FLSA, as distinguished from the private sector. Originally, the FLSA did not apply to employees of States or political subdivisions. Congress extended coverage in 1966 to employees of State and public entities operating transit companies, hospitals, schools and related institutions. The U.S. Supreme Court upheld the constitutionality of applying the Act to such entities in *Maryland* v. *Wirtz*, 392 U.S. 183 (1968).

In 1974, Congress extended coverage to all public sector employees, exempting only elected officials and their immediate staffs. It did so with the stated intent to cover virtually all public sector employees who were not within the scope of the section 13(a)(1) exemption. The committee report accompanying the bill that became the 1974 Amendments described the provisions affecting Federal, State and local government employees in the following manner:

> Section 6 of the bill extends minimum wage and overtime coverage to about 5 million *non-supervisory* employees in the public sector not * * * [then] covered by the Act. * * * The bill will provide that virtually all *non-supervisory* government employees will be covered. * * * By the same token, the committee intends to cover all employees (*except professional, executive, and administrative personnel who are exempted under section 13 of the law*) in all civilian branches of the Federal Government." (H.R. Rep. No. 93-313, p. 27 (1974); emphasis added.)

In 1976, however, the U.S. Supreme Court considered the special nature of State and local governments under the FLSA and ruled that the FLSA's minimum wage and

overtime pay provisions could not constitutionally be applied to State and local government employees engaged in traditional governmental activities. (*National League of Cities v. Usery*, 426 U.S. 833 (1976).) The Court expressly overruled *Maryland* v. *Wirtz* with regard to the Act's application to public school and hospital employees, but National League did not alter the continued application of FLSA to employees engaged in activities that are not "traditional" functions of government.

In 1985, the Supreme Court reversed National League in *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985). The Court reasoned that sufficient authority existed to apply the FLSA to State and local governments under the commerce clause of the Constitution and found that applying Federal regulation based on the distinction between "traditional" and "nontraditional" governmental functions was unsound and unworkable. In response to Garcia, Congress amended the FLSA in November 1985 to address particular concerns of State and local governments and to provide relief from liability during a temporary adjustment period after the Garcia decision. New provisions were added to allow the use of compensatory time off in lieu of cash wages for overtime in the public sector, with a higher maximum limit on the number of hours that can be accumulated by public safety and certain other employees; to include overtime exemptions for certain employment situations in which employees work dual jobs; and to provide special rules for public agency volunteers. The 1985 Amendments did not, however, affect section 13(a)(1) of the Act or specifically address the application of the executive, administrative, or professional employee exemption to State and local government employees. Neither the statutory changes nor the legislative history of the 1985 Amendments contain any significant references to section 13(a)(1) or 29 CFR part 541.

C. Public Sector Pay Systems and the FLSA

Some State and local government jurisdictions operate pay policies based on constitutional or statutory provisions while others are derived from regulations or policies that have evolved over the years. The rules and procedures of many of these pay systems were in place long before FLSA coverage of the public sector brought on by the 1985 Garcia decision. Such pay systems are generally premised on a concept derived from principles of public accountability that governmental employees should not be paid for time not worked due to the need to be accountable to the taxpayers for the expenditure of public funds.

At the time of Garcia, therefore, most public employers had in place compensation systems requiring all employees, regardless of how paid, to use accrued leave time or incur a reduction in pay for any absences from work. Such Governmental payroll systems prohibited paying employees for time not actually worked that was not covered by accrued leave, regardless of whether the time not worked was greater or less than one full work-day. Thus all public employees under such systems, including highly-compensated managers who otherwise would clearly be exempt from the overtime requirements, could be classified as non-salaried and thus non-exempt. As a consequence, few public employers compensated employees in a manner that would satisfy the "on a salary basis" provision required by the regulations.

The Department first observed this anomaly when responding to written inquiries from public sector employers following the Supreme Court's Garcia decision in 1985. It was also raised in public comments received on the Department's Advance Notice of Proposed Rulemaking (ANPR) on Part 541 published in the Federal Register on November 19, 1985 (see 50 FR 47696), before the 1985 FLSA Amendments went into effect. One issue

raised in the ANPR was whether the salary tests for exemption should be increased or eliminated.

During this same time frame, the Office of Personnel Management (OPM) issued regulations on the 541 exemption for executive, administrative, and professional employees of the federal government. Under OPM's regulations, exempt status was determined according to grade level and the position classification system rather than salary, and did not include a "salary basis" requirement.[2] With this background, the ANPR also raised the question "[s]hould the Department recognize individual State and local government civil service systems for classifying [executive, administrative, and professional] EAP employees in applying the exemption to employees of such governments?"

Two commenters responding to the ANPR pointed to the conflict between State and local laws and § 541.118 by noting that State or local laws frequently prohibit employees from being paid for time not actually worked, or not covered by annual, sick, or other types of paid leave. These commenters cited the example of an otherwise exempt public employee who is absent from work for personal reasons, or is unable to work because of illness or accident, where the employee has not accrued, or has exhausted, paid leave time, being paid only for the hours actually worked in accordance with applicable State or local law. Consequently, a public employer that makes deductions from pay for absence(s) computed on an hourly basis would not be in compliance with the "salary

[2] Section 4(f) of the FLSA provides that the Department of Labor will administer the Act for employees employed in the Library of Congress, the United States Postal Service, the Postal Rate Commission, and the Tennessee Valley Authority. OPM administers FLSA with respect to all other employees of the Federal Government except certain Congressional employees. See 29 U.S.C. section 204(f). Reorganization Plan No. 2 of 1978 (92 stat. 3783), and section 8 of the Fair Labor Standards Amendments of 1989 (Pub. L. 101-157).

basis" requirements in § 541.118 that allow for deductions to be made in such cases only for absence(s) of a full day or longer.

The Department also received comments expressing concerns about the "salary basis" requirement for exemptions for public sector employers in response to proposed regulations issued to implement the 1985 FLSA Amendments (51 FR 13402; April 18, 1986). These comments were noted in the preamble to the final rule as follows:

> Finally, several commenters requested various forms of special treatment for State and local governments with respect to the section 13(a)(1) exemption for bona fide executive, administrative, and professional employees, particularly with respect to the requirement in 29 CFR Part 541 that such employees be paid on a salary basis. The commenters argued that State and local governments should be permitted to make deductions from an exempt employee's salary for absences of less than a day. They argued that this change is necessary to recognize current payroll practices, as well as State and local government laws which preclude the payment of wages for hours not worked (except for earned leave).

On November 19, 1985, the Department of Labor published in the Federal Register (50 FR 47696) an advance notice of proposed rulemaking requesting the views of the public on any changes they felt were necessary in 29 CFR part 541. The comment period ended on March 22, 1986. However, the Department expects to publish a notice of proposed rulemaking concerning Part 541 during 1987. Interested parties will have an opportunity to offer comments on the subject matter of that regulation at that time.

In light of the separate rulemaking process with respect to part 541, it would not be appropriate for the Department to address this issue in developing a final rule for part 553.

* * * *

And:

Several commenters, including various cities, the National League of Cities (NLOC) and the National Public Employer Labor Relations Association (NPELRA), stated that 29 CFR part 541 should be revised to eliminate the requirement that an exempt employee be paid on a salary basis.

As discussed earlier under § 553.32, there is a separate rulemaking process with respect to part 541.

Therefore, it would not be appropriate for the Department to address this issue in developing a final rule for part 553.

This discussion of comments received on proposed 29 CFR §§ 553.32 (at 52 FR 2019) and 553.216 (at 52 FR 2023) was published in the Federal Register January 16, 1987.

* * * *

E. Developments in Private Lawsuits

The Wage and Hour Division's 1987 enforcement policy expressly stated that it was not intended to affect the rights of public employees to file private lawsuits under section 18(b) of the FLSA.[3] Since the Supreme

[3] Under section 10 of the Portal-to-Portal Act of 1947, Public Law No. 40, 80th Cong., ch. 52, 1st Sess. (29 U.S.C. 251 *et seq.*), an employer has a defense against liability for failure to pay minimum wages or overtime compensation under the FLSA if the employer pleads and proves that "* * * the act or omission complained of was in good faith in conformity with and in reliance on any written administrative regulation, order, ruling, approval, or interpretation, * * * or any administrative practice or enforcement policy of [the Wage and Hour Administrator] with respect to the class of employers to which he belonged. Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that after such act or omission, such administrative regulation, order, ruling, approval, interpretation, practice, or enforcement policy is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect." (*See also* 29 CFR 790.13 & .18.)

Court's *Garcia* decision in 1985, numerous lawsuits have been filed by public employees seeking to recover overtime premium pay from their employers, and in many of these cases the resolution of the exempt status of employees turned solely on the court's reading of the "salary basis" requirement in the regulations. The courts have interpreted the construction of the regulations in different ways, reaching different results.

In circumstances where the public entity's pay practices called for the docking of pay for partial-day absences when leave was not available, some courts concluded that a salary was not "subject to" deductions where there was no evidence that the employee's pay was ever reduced; that only actual and not "theoretical" deductions could invalidate the salary basis of compensation;[4] and that rare instances of docking pay for absences of less than a day did not defeat eligibility for the exemption except in the workweek in which a deduction was made.[5] Other courts have allowed public employers to utilize the "remediation" provisions at 29 CFR 541.118(a)(6) to preserve the exempt status of employees in cases where inadvertent deductions were made from pay for absences of less than a day when leave was exhausted, the affected employees were reimbursed for such deductions, and the employer promised to comply in the future.[6]

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[4] See, e.g., *Atlanta Professional Firefighters Union v. Atlanta*, 920 F.2d 800 (11th Cir. 1991); *Harris v. District of Columbia*, 709 F. Supp. 238 (D.D.C. 1989).

[5] See, *D.C. Nurses Assn. v. District of Columbia*, 29 WH Cases 808 (D.D.C. 1988).

[6] See, e.g., *Hartman* v. *Arlington County, Va.*, 720 F. Supp. 1227 (E.D. Va. 1989), aff'd, 903 F.2d 290 (4th Cir. 1990); *Fire Fighters Local 2141* v. *City of Alexandria, Va.*, 720 F. Supp. 1230 (E.D. Va. 1989), aff'd, 912 F.2d 463 (4th Cir. 1990); *Harkins* v. *City of Chesapeake*, 29 WH Cases 1399 (E.D. Va. 1988); *Chadwick* v. *City of Norfolk, Va.*, 29 WH Cases 1407 (E.D. Va. 1988); and *Sarver* v. *City of Roanoke, Va.*, 29 WH Cases 1442 (W.D. Va. 1989).

In contrast, other courts determined that the exemption was inapplicable under the "'salary basis' requirement solely because a public entity's pay system required docking of pay when leave was not available. Some courts held that employees under such a pay system calling for deductions to be made when the employee is absent and has no leave are not paid "on a salary basis" even if no such deductions have in fact occurred.[7]

Such judicial interpretations and accompanying confusion were exposing governmental employers to potentially enormous and generally unexpected back wage liabilities for many employees who would clearly be exempt but for the treatment of leave and the docking of pay for partial-day absences when leave was unavailable. Following the denial of certiorari (January 1991) and petition for rehearing (March 1991) in Abshire, representatives of State and local governments, including the National League of Cities, the United States Conference of Mayors, and the League of California Cities, presented their urgent concerns to the Department arising from the flood of lawsuits being filed by public employees and requested prompt action by the Department to address the matter in light of the anticipated effects of post-Abshire litigation.

These State and local government representatives indicated that, without immediate action by the Department of Labor to revise the regulations for State and local governments, the potential liabilities for affected governmental entities would become devastating. They expressed concern over the fundamental inequity of courts granting windfall awards of across-the-board retroactive

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[7] See, e.g., *Abshire* v. *County of Kern*, 906 F.2d 483 (9th Cir. 1990), cert. denied, 111 S.Ct. 785 (1991), rehearing denied, 111 S.Ct. 1341 (1991); *Banks* v. *City of North Little Rock*, 708 F. Supp. 1023 (E.D. Ark. 1988); *D'Camera* v. *District of Columbia*, 693 F. Supp. 1208 (D.D.C. 1988); *Hawks* v. *City of Newport News, Va.*, 707 F. Supp. 212 (E.D. Va. 1988); *Harrison* v. *District of Columbia*, 30 WH Cases 557 (D.D.C. 1991).

overtime payments to public employees who never had any actual deductions made in their salaries, along with employees who rarely had such deductions, but all of whom would be entitled to substantial back pay under Abshire simply because their salaries were theoretically "subject to" the possibility of docking.[8] They asserted that this resultant windfall was not required by, and that Abshire was an extreme interpretation of, DOL's regulations. They stated their belief that § 541.118(a)(6) allows public employers to make occasional deductions in the salary of individual employees without defeating the salary basis for all employees, so long as the deductions are not significant in relation to the total compensation paid all similarly classified exempt employees; moreover, that the exemption would be lost for an individual employee if the deductions in pay are regular and recurring vis-a-vis that individual employee; that in the event of occasional deductions, a public employer should be permitted to pay overtime to the affected employees who have been docked for the specific work periods in which the deductions were made without losing the exemption for employees whose pay was not docked or for the docked employees in pay periods in which no docking took place; and, that in the event of regular and recurring deductions, the exemption should be denied to the affected employee only, in all workweeks it is claimed, including those weeks

[8] Mayor David Dinkins of New York City described the situation in an August 14, 1991 letter to Secretary of Labor Lynn Martin as follows:

The City of New York, along with many other jurisdictions, faces serious fiscal problems. To meet those problems we have already cut services and laid off thousands of employees. The layoff of State and Local government employees has been cited by the staff of the Federal Reserve Board as a reason for the continuing weakness in the economy. To exacerbate those fiscal problems and those layoffs to pay overtime to management employees because of the application to the public sector of a regulation designed for the private sector would be contrary to the public interest.

when no deductions are made. They supported their views by noting prior Wage and Hour opinion letters which they asserted stated that occasional docking of salary by a public employer, after exhaustion of available leave, would only result in a loss of the exemption for the employee whose pay was docked, and only then for the period (i.e., workweek) in which the deduction occurred (citing opinion letters of the Wage and Hour Administrator dated January 15, 1986 ((reprinted in Fair Labor Standards Handbook For States, Local Governments & Schools, supra, p. 69)); January 17, 1986 ((unpublished)) ((which states that "[w]here an occasional deduction that is not permitted by § 541.118 is made from the salary of an otherwise exempt employee, the exemption would be lost in that workweek when the deduction was made.")); and July 17, 1987 ((reprinted in Fair Labor Standards Handbook For States, Local Governments & Schools, supra, p. 159)) ((discussing "losing the exemption for that week" and noting "[i]t is our opinion that, although the employee would be considered a nonexempt employee during those weeks when paid on an hourly rate basis, it would not affect the employee's exempt status in other weeks when the employee is paid on a salary basis.")).) Some courts, they observed, had adopted positions consistent with their interpretations and, in fact, had relied upon the cited opinion letters in deciding that the exemption was still available to public employers operating such leave "systems" that reduced the pay of employees for absences of less than a day.[9]

[9] See, e.g., *DC Nurses Assn.* v. *District of Columbia*, *supra*, 29 W.H. Cases at 889 n. 1; *Fire Fighters Local 2141* v. *City of Alexandria, VA.*, *supra*, 720 F. Supp. at 1232; *Harris* v. *District of Columbia*, *supra*, 709 F. Supp. at 241.

F. The Department's September 1991 Rulemaking

Because of concerns that the unexpected liabilities threatened to seriously impair the fiscal integrity of many State and local governmental agencies, and would disrupt widespread, long-standing pay practices that had been designed to serve the public trust, the Department undertook separate rulemaking on the specific issue of application of the "salary basis" rule to public sector employees, while continuing its overall review of the full range of issues under 29 CFR part 541 raised by the public comments submitted on its ANPR of November 19, 1985 (50 FR 47696). Recognizing the special circumstances of public sector employment, under which employees are paid pursuant to pay systems established according to principles of public accountability, and in light of the potentially enormous, unforeseen liability which could threaten the governments' fiscal integrity as a result of retroactive overtime payments to public employees considered exempt by their employers, the Department proceeded with rulemaking on an expedited basis, finding good cause to waive the normal requirement for prior notice and comment.

The Department published an Interim Final Rule (IFR) on September 6, 1991 (56 FR 45824), inviting public comments for 30 days, modifying the "salary basis" rules affecting eligibility for exemption under section 13(a)(1) of FLSA for employees in the public sector only. The Department issued the IFR to allow State and local governments to continue their public-accountability pay systems without incurring liability for overtime pay under FLSA to employees who would otherwise be exempt from the overtime pay requirements. A new § 541.5d was added to the regulations to provide that an otherwise exempt public sector employee who is paid according to a pay system that requires the use of paid leave for partial-day absences for personal reasons or due to illness or injury and, when leave is not used or is exhausted, reduces the

employee's pay for such absences of less than one full work-day, will not be disqualified from exemption due to such pay system. The rule also provided that the exemption would not be defeated by deductions from salary caused by budget-required furloughs that are not regular and recurring, except in the workweek in which a deduction occurs. The Department left all other aspects of the salary test unchanged, as well as the duties and responsibilities tests of the exemption, as applied to employees in the public sector.

The Department also published a Notice of Proposed Rulemaking (NPRM) on the same day (56 FR 45828; September 6, 1991), inviting public comment for 30 days on a separate proposal at 29 CFR 541.118(a)(6)(ii) to allow public sector employers with pay systems as specified in the IFR, under which past deductions were made in the pay of otherwise exempt public employees for absences of less than one work-day for personal reasons or due to sickness or injury, to reimburse the employees for those deductions that occurred before the IFR went into effect and thereby restore the employees' eligibility for exemption. The regulatory proposal also provided that the "salary basis" component of the exemption would not be disallowed under such pay systems where no actual deductions were made before the IFR went into effect. Upon review of the comments submitted on the NPRM, the Department is withdrawing the proposal from further consideration and it will not be implemented as a final rule. See, published elsewhere in today's *Federal Register*, a document that withdraws this NPRM. The Department will be proposing a legislative remedy to address such retroactive liability.

In response to a request from representatives of labor organizations affiliated with the AFL-CIO and its Public Employee Department, on October 4, 1991, the Department extended the public comment period for an additional 30 days on both the IFR and the NPRM (see 56

FR 50256; 56 FR 50302), and the period for public comment closed on November 6, 1991.

The Department received a total of 398 comments during the comment period, generally as follows:

—229 in favor, from governmental entities, associations or individuals (23 States or State agencies and other entities (e.g., university, etc.); 124 cities (or agencies thereof); 46 counties (or agencies thereof); 29 associations of governments (e.g., National League of Cities, U.S. Conference of Mayors, National Association of Counties, etc.); and 7 others including law firms;

—169 opposed, from employees, unions and associations, law firms, or individuals (137 employees, including 114 individuals who are employee-plaintiffs in a lawsuit pending against the City of New York); 25 employee associations/unions; and 7 others, including law firms.

In addition, in response to the President's directive to Federal agencies to involve the public and other interested parties in evaluating existing regulations and programs to identify initiatives that would eliminate unnecessary regulatory burdens or otherwise promote economic growth, the Department published a Request for Information in the *Federal Register* on February 24, 1992 (57 FR 6301), requesting public input on the Department's current regulations and those under consideration in terms of identifying burdens placed on the economy, inhibitions to growth, and the benefits achieved by the regulations. Representatives of the governments of thirty States, the District of Columbia, Salt Lake City, Utah, Personnel Administrators of Texas Senior Colleges and Universities, the International Personnel Management Association, and the National Association of State Personnel Executives responded to this Notice offering views on the effect of Regulations, 29 CFR Part 541, on the public sector, stating that lawsuits were resulting in windfall back wage

payments as a result of technical violations of the "salary basis" test, and suggesting other areas of difficulty under the duties and responsibilities tests for exemption as an "administrative" employee under § 541.2. Several comments were also received suggesting revisions or review of other aspects of Regulations, 29 CFR part 541, including its application to the private sector. Some private sector commenters have suggested that modern compensation practices, especially those adopted to provide increased flexibility in the workplace and to reduce artificial distinctions among classes of employees, have made the salary basis test anachronistic. The Department is currently reviewing these comments, as well as those received in response to the 1985 ANPR, in order to determine what further rulemaking proceedings may be appropriate with regard to these and the other issues raised.

With regard to the public sector, which is the subject of this rulemaking, it is clear to the Department, after review of all of the comments, that certain aspects of the "salary basis" test for distingiushing exempt from non-exempt employees did not serve their intended purpose when applied to the public sector, as aspects of the "salary basis" requirement are unduly restrictive when applied in the public sector. In the Department's view, these aspects are not valid indicators of the *bona fides* of a claimed exemption under section 13(a)(1) in the public sector where every employee may theoretically be subject to potential docking for partial-day absences. State and local governments were thus being inappropriately deprived of the opportunity to apply the section 13(a)(1) exemption to their employees who would otherwise be properly exempt. For these reasons, the Department is of the view that public sector pay systems have to be analyzed differently from private sector pay systems.

The major comments received on the current rulemaking are summarized below, together with a discussion of the significant changes that have been made in the final regulatory text in response to the comments received. A

number of comments were submitted that focused on issues in the regulations on which the Department had not proposed changes or invited public comment, which the Department will not be addressing at this time. However, to the extent appropriate, the Department will consider these views in the context of its overall review of the full range of issues being considered in connection with the Department's November 1985 ANPR and February 1992 Request for Information.

III. Summary of Major Comments

As a preliminary matter, one law firm (Fisher & Phillips) commented that the narrative discussion in the preamble to the IFR (at p. 45824 of the September 6, 1991, *Federal Register*) incorrectly stated the requirements of the salary test in the exemptions discussed in part 541 when it suggested that "[c]ompensation must be greater than the amount specified in the regulations, and must be on a salary basis.'" The comment is correct. Under the regulations, compensation must be ". . . at a rate of not less than . . ." the amounts specified in the regulations.

Comment: Clarify the applicability of the remaining elements of the "salary basis" test.

Several commenters (American Federation of Teachers (AFT); International Association of Fire Fighters (IAFF); United Auto Workers (UAW)) commented that it was not clear that public employers continued to remain subject to all other aspects of the "salary basis" test in the regulations, stating that some public employers have attempted to argue in pending lawsuits that the Department's interim final rule completely eliminated all aspects of the "salary basis" test in the public sector.

The Department's interim final rule did not eliminate altogether the "salary basis" test in the public sector. A public sector employer must still be able to demonstrate that a claimed exempt employee satisfies all other aspects of the "salary basis" requirements for exemption. The

interim final rule states specifically that to be exempt under the new exception an employee must be one "* * * * who otherwise meets the requirements of § 541.118 * * *," the regulation which defines payment on a salary basis. The new § 541.5d added to the regulations provides that an otherwise exempt public sector employee would not be disqualified from exemption "* * * on the basis that * * *" the employee is paid according to public pay systems that require the use of paid leave and, when leave is not used or is exhausted, reduce employees' pay for absences of less than one full work-day for personal reasons or due to illness or injury. The rule also provided that eligibility for exemption would not be defeated by deductions from salary caused by budget-required furloughs that are not regular and recurring, except in the workweek in which a deduction occurs. Only partial-day deductions from pay when leave was not used or was exhausted and furlough-required deductions were addressed by the interim final rule. All other aspects of the salary test were left unchanged for the public sector, as these commenters pointed out.

* * * *

Comment: It is inappropriate to apply the section 13(a)(1) exemption for public sector employers differently than for private sector employers.

A number of commenters (AFT; Carrol, Burdick & McDonough on behalf of the California Department of Forestry Employees Association (Local 2881 IAFF); Brenda J. Carter, Esq.; Davis, Reno & Courtney on behalf of the Engineers and Architects Association, Los Angeles, CA; IAFF; International Union of Police Associations; LIUNA; National Association of Police Organizations; SEIU; and Zwerdling, Paul, Lebig, Kahn & Thompson) suggested that there is no basis for the Department to distingiush between the private and public sectors under the section 13(a)(1) exemption. Some of these commenters pointed to the 1985 FLSA Amendments as clear evidence that the lack of attention to this

issue by Congress in those Amendments reflected a specific Congressional intent not to distingiush between these two types of employment for purposes of applying section 13(a)(1) of the Act. Another commenter (Council of Engineers and Scientists Organizations) stated that the 1974 FLSA Amendments demonstrate that Congress intended to extend the same, equal protection to employees in the public and private sectors. One other commenter (AFSCME) suggested that the Department could have encouraged public employers to alter their policies concerning deductions of less than a day or that less drastic remedial measures could have been taken, such as altering the regulations to require that an actual deduction of pay occur before the exemption is lost.

The regulations defining the section 13(a)(1) exemption, largely in their present form, were adopted long before Congress extended the rights and protections of the FLSA to employees in the public sector.[11] Thus, the practice of docking public employees' pay for partial-day absences when paid leave was not available was not initially a concern in the administration of section 13(a)(1) of the FLSA.

Significantly, the existing regulatory requirements were adopted following public hearings in the 1940's and 1950's, which included evidence from witnesses showing that *bona fide* executive, administrative, and professional employees in the industries at that time subject to the FLSA were almost universally paid on a salary basis. These fact-based inquiries, conducted before the public sector became subject to the FLSA, did not include an examination of prevailing governmental pay practices. The historical record based on contemporaneous evidence also indicated that employees who did not meet the salary

[11] The general requirement that an exempt employee be paid "on a salary basis" has been an integral part of the regulations since 1940, and 29 CFR 541.118 ("salary basis") has remained essentially unchanged since revisions were last made in 1954.

test generally also did not meet the other requirements of the exemption.[12] The opposite is true with respect to the Department's current rulemaking, which was intended to address prevailing public sector pay systems operating under statute, ordinance, regulation, or other established public policy requiring all employees, including otherwise-exempt managers and executives, to use accrued leave time or incur a reduction in pay for any absences from work.

When FLSA coverage was extended to include public sector employees, separate provisions were not added to the regulations to define the section 13(a)(1) exemption in a manner that would distinguish public from private sector employment.

However, it is clear from a plain reading of FLSA's legislative history in 1974 (quoted in section II.B. above) that Congress intended for the section 13(a)(1) exemption to be available for public sector employees. Congress presumably was unaware that, because many public sector compensation systems preclude payment for hours not worked, these systems would, solely for that reason, be found to fail to meet the regulatory "salary basis" component of the exemption. In light of the public accountability principles prevalent in public sector pay systems, the regulatory requirements adopted before Congress extended FLSA coverage to State and local governments simply could not operate in a manner that effectively distinguished exempt from non-exempt public employees. The regulations were thus out of harmony with the intent of the statute because State and local governments could not practically avail themselves of the exemption intended by Congress, and thus were inappropriate as applied in the public sector.

[12] See, e.g., Proposed revision of Regulations, Part 541, under the Fair Labor Standards Act. Report and Recommendations (U.S. Department of Labor, Wage and Hour and Public Contracts Division, Washington, D.C. March 3, 1958), p. 2.

The fact that public sector employers had pay systems that prevent them from paying employees for part-day absences when paid leave is not available, and thus could invalidate the exemption for all employees "subject to" such pay systems under the principles set forth in *Abshire*, was not generally recognized to be the problem it is today when the 1985 Amendments were enacted. The 1985 legislation's silence on this issue is not indicative, in the Department's view, of an intent to make the section 13 (a)(1) exemption unavailable to public sector employers because of the nature of their pay systems.

Congress expressly authorized the Secretary of Labor to prescribe the requirements for exemption under section 13(a)(1) of the Act when it provided that "* * * such terms are defined and delimited from time to time by regulations of the Secretary * * *." Had Congress felt that the Department should not be free to revisit and revise its regulations in the future based on its enforcement experiences, it would have amended the statute to remove the Secretary's discretion to "* * * define[] and delimit[] from time to time by regulations * * *." The Congress has not made such a change throughout the history of the Act despite the numerous opportunities by the Congress over the years to amend section 13(a)(1).

Furthermore, the regulations promulgated immediately after enactment of the FLSA to implement section 13 (a)(1) of the Act contained a section entitled "Petition for amendment of regulations" which provided, in part, that:

> [I]n determining * * * future regulations, separate treatment for different industries and for different classes of employees may be given consideration.

This provision has remained a part of the regulations throughout their history. See 29 CFR 541.6 (1991). The Department has always had authority under these regulations to consider separate treatment of the public sector.

In light of the court decisions and representations by affected parties, the Department has determined that strictly applying all aspects of the salary basis rule to the public sector under section 13(a)(1) has produced results that do not effectuate the intended purposes of the Act. The Department considers it inconsistent with Congressional intent and inappropriate that the exemption be denied in the public sector to virtually all employees solely because their pay is subject to deduction for partial day absences where paid leave is not used, pursuant to pay systems that were established according to principles of public accountability, and, in some cases, imposed by law, ordinance or regulation, even before Congress extended the Act's coverage to the public sector. As a result, the Department has determined that these specific elments of the "salary basis" test are not valid indicators in the public sector of the bona fides of a claimed exemption under section 13(a)(1), and the revisions herein are necessary in order to give effect to the statutory exemption in the public sector as intended by Congress under the 1974 Amendments.

It is important to note that public pay systems, in many cases are the result of requirements in State constitutions and statutes, civil service systems, city charters and ordinances, or regulations. Even if it were procedurally possible to change personnel policies through amendments to constitutions and charters and the repeal of all applicable laws and ordinances, it appears to the Department that the changes in public policy and tradition required for governments to conform to the Department's salary basis requirements, as interpreted by the Abshire court, are not consisent with the public accountability principles supported and required by the public. Thus, with respect to AFSCME's suggestion that the regulations could have been revised to require an actual deduction in pay for the exemption to be lost, principles of public accountability embodied in the need to be accountable to the taxpayers for the expenditure of public funds only for

hours actually worked require that the exemption criteria for the public sector take into account the fact that the pay systems at issue reduce pay for partial-day absences when leave is exhausted. As initially expressed in the preamble of the IFR, the Department's understanding that public sector employers necessarily must be held to a higher standard of accountability regarding the use of public funds in paying public employees was confirmed by the comments received during the rulemaking process. Consequently, to limit the rule to disallowing exemption in those workweeks that pay is reduced for absences not covered by available paid leave, as suggested, would simply not be responsive and would result in a rule that remains inadequate for appropriately distinguishing exempt from non-exepmt employees in the public sector.

* * * *

Comment: The "salary basis" test should be deleted for public sector employees.

Four commenters (City of Bellingham, WA; County of Fairfax, VA; Florida League of Cities; and Law Department, Salt Lake City, UT) suggested that the "salary basis" test should be deleted altogether, or made inapplicable as in Senate Bill S. 1670 (Seymour, CA), 102nd Cong., 1st Sess., or replaced with a minimum salary level, increased from present levels, above which the "salary basis" test would not apply.

The Department's IFR was narrowly drafted in response to a demonstrated need to specifically address the particular fact that the existing "salary basis" test in the regulations produced inappropriate results when applied to public sector compensation systems which, based on principles of public accountability, reduce pay for partial-day absences for personal reasons or due to sickness or injury when leave is not used. All other requirements of the salary test were left unchanged as applied to employees in the public sector. Sufficient justification has not been shown in the comments to warrant eliminating al-

together the "salary basis" requirement or making it inapplicable to public sector employees paid above some minimum "upset" salary level.

Comment: Revise the regulations to reflect differences in the nature of public sector jobs.

Several commenters (CA Department of Personnel Administration; International Personnel Management Association; National Association of State Personnel Executives; and University of California) suggested that the concept that public sector employment differs significantly from that of the private sector should be expanded to the duties and responsibilities tests, noting in particular the "administrative" employee exemption in § 541.2 and perceived difficulties in applying "production work" concepts to the modern work place typical of today's government employees. One commenter (Human Relations Department, Chatham County, GA) suggested the Department pursue an entirely separate set of regulations for the public sector. These comments do not address the "salary basis" subject matter of the current rulemaking and will have to be dealt with at a latter date when revisions to § 541.2 are considered and proposed for public comment.

* * * *

Comment: § 541.118(a)(5) regarding deductions for penalties imposed for infractions of safety rules of major significance should be broadened to include disciplinary suspensions of public sector employees.

Several commenters (Arnstein & Lehr on behalf of the City of Naperville, IL; County Attorney, Fulton County, GA; Fisher & Phillips) stated that disciplinary situations are unique in the public sector, particularly in organizations like police departments, or different from those of the private sector because public employees have less freedom to terminate employees absent extraordinary circumstances and thus must use disciplinary suspensions without pay to rehabilitate or control behavior; that public employers have virtually no other penalty options; and that

suspension for a full week, which can be done without jeopardizing exempt status, is rarely imposed because of its severity. One commenter (County Attorney, Dade County, FL) suggested that disciplinary systems promulgated by statute, ordinance, administrative order, standard procedure, or collective bargaining should be treated in the same manner as the new regulation treats deductions for partial-day absences. One commenter (Fisher & Phillips) noted that such disciplinary systems were in place at the time of the Garcia decision and are premised on the concept that public employers should be accountable to the taxpayers for the conduct of public employees. Another commenter (City of Norfolk, VA) stated that failure to allow disciplinary deductions in the case of exempt employees could result in inconsistent application of discipline among exempt and non-exempt employees.

In the Department's judgment, the comments have not suggested a sufficient basis for distinguishing between the public and private sectors with respect to any recommended change in the rule. Although contrary assertions were made, the comments failed to demonstrate that public employers are significantly more restricted in the availability of options with respect to employee discipline than private employers. Although public employee terminations may require compliance with procedures designed to protect employee rights, termination for disciplinary reasons is not generally unavailable. In addition, other remedies for disciplinary infractions, such as official reprimands, demotions, and reassignment or restriction of duties, are generally available and used in the public sector.

Section 541.118(a)(5) was not open for comment during the present rulemaking. However, the Department expects to consider this issue as appropriate in proposed revisions of Part 541 at a later date.

* * * *

Comment: Clarify the meaning of the phrase "workweek in which such deductions occurred" in § 541.5d(b).

One commenter questioned during which workweek a furloughed employee was to be treated as non-exempt—the week the furlough day was taken, the week the reduced pay check is received, or one of the weeks for which the pay check represents the employee's compensation? The exemption is lost in the workweek in which the furlough day is taken and for which the employee's pay is accordingly reduced. The language has been clarified in the final rule.

Comment: Clarify that all improper deductions result in loss of the exemption only for the particular employee docked and only in the workweek of the improper deductions.

One commenter (City of Chicago) suggested, in effect, that the new rule relating to furloughs be extended to any and all improper deductions so that the exemption would be lost only in the week(s) in which deduction(s) occur. Depending on the circumstances surrounding the impermissible deductions actually made, the suggested clarification would not be consistent with the existing provisions at § 541.118(a)(6) which hold that the effect of making a deduction which is not permitted will depend upon the facts in the particular case. The Department considers the suggested change to be a significant departure from long-standing policy that is not substantiated by comment. Nor has any basis been presented to give special treatment in this regard to the public sector. It has, therefore, not been adopted in the final rule.

Comment: Include situations where the employee does not have permission to use available leave credits.

One commenter (Director of the Budget, State of New York) made the observation that negotiated agreements often require employees to obtain the employer's approval to be absent from work and be eligible to apply leave credit to be paid for the absence. Apparently, if the

absence is unauthorized under such agreements, the employee is denied the use of leave credits and pay is reduced.

If advance approval of an absence is required under the terms of the employer's leave policy and is not sought or is sought and denied in a particular instance, leave availability for such employee is no different than when leave has been "exhausted." The commenter's recommendation that language be added to address this condition has been adopted, and the final regulation has been clarified in this regard.

* * * *

Comment: Allow deductions for periods of illness or injury of one or more workdays regardless of whether there is a leave plan.

One commenter expressed concern that some small public employers have no sick-leave plans, and, thus, would not be able to deduct for absences of one or more days for illness or injury under § 541.118(a)(3) without losing eligibility for the exemption, or would have to adopt a minimal plan to satisfy the test for *bona fide* plan, policy or practice in order to permit such deductions without losing such eligibility. This problem arises for the public employer whose pay system requires deductions for any time not worked, but which does not have any kind of plan for compensating employees for lost time due to sickness or injury and which is located in a State that does not require a disability insurance plan. According to opinions issued over the years by the Wage and Hour Administrator, the plan that an employer would have to adopt to preserve exempt status for its employees can be simple and need not be particularly generous, so long as it is impartially allocated to the affected employees. In this regard, there is no requirement in § 541.118(a)(3) for any specific amount of leave to be stated under such plans, thus allowing considerable flexibility under the regulations.

* * * *

Comment: Delete the phrase "* * * (because the leave has been exhausted or by the employee's choice) * * *"

One commenter stated that this phrase is under-inclusive in that it does not take into account the practice of docking an employee's pay for being absent without leave (AWOL) for less than a day. The commenter suggested deleting the phrase. This concern has been addressed in the final rule with respect to the change made regarding systems that require employees to obtain advance permission to be eligible to utilize leave to be paid for absences.

Comment: Clarify the phrase "* * * requires the employee's pay to be reduced * * *"

One commenter observed that this phrase may be interpreted to exclude a public pay system where the practice of docking pay is, to any degree, *discretionary* with the public employer. This commenter suggested that the regulations be revised to read "* * * the public employee's pay can be reduced * * *"

The regulation protects public sector employers from a finding of non-exempt status solely because their pay system requires deductions from pay when leave is not used for the reasons stated in the regulations. If a deduction from pay (or the decision not to deduct) is based purely on the employer's discretionary choice, compensation would be "subject to deduction" for a reason other than that specified in the IFR. The change suggested by the commenter would broaden the exemption to include all deduction practices, whether or not required by the pay system, and whether or not mandatory or discretionary. We do not believe that this suggestion is consistent with the underlying justification for initiating the rulemaking, i.e., that principles of public accountability require that public sector employees not be paid for hours not worked that are not otherwise covered by an entitlement agreement, such as paid leave.

Comment: Delete the clause "* * * for personal reasons or because of illness or injury * * *".

One commenter proposed that this clause be deleted because it, too, would narrow the permissible reasons for docking pay for AWOL absences of less than a day. As previously discussed, AWOL absences have been addressed in the final rule, which treats unauthorized absences in the same manner as instances where leave is not available because it has been exhausted.

Comment: Clarify the status of leave deductions.

Several commenters (AFT; the cities of Alhambra and San Jose, CA, and Norfolk, VA; SEIU; UAW) observed that the rule referred to pay deductions only and was silent on the isue of whether deductions from paid leave accounts for partial-day absences can affect the determination of salaried status. Under the terms of this regulation, deductions from either accrued leave or pay when leave is not used for the reasons stated, will not disqualify an employee from being paid "on a salary basis." It is the Department's position that an employer can require an employee to substitute paid leave for absences of less than a day without losing the exemption for that week because, in such circumstances, the employee does not experience a deduction from pay.

* * * *

List of Subjects in 29 CFR Part 541

Labor, Minimum wages, Overtime pay, Salaries, Teachers, Wages.

Accordingly, part 541 of title 29 of the Code of Federal Regulations is amended as set forth below.

Signed at Washington, DC, on this 14th day of August 1992.

Lynn Martin,
Secretary of Labor

Cari M. Dominguez,
Assistant Secretary for Employment Standards.

Karen R. Keesling,

Acting Administrator, Wage and Hour Division.

PART 541—DEFINING AND DELIMITING THE TERMS "ANY EMPLOYEE EMPLOYED IN A BONA FIDE EXECUTIVE, ADMINISTRATIVE, OR PROFESSIONAL CAPACITY (INCLUDING ANY EMPLOYEE EMPLOYED IN THE CAPACITY OF ACADEMIC ADMINISTRATIVE PERSONNEL OR TEACHER IN ELEMENTARY OR SECONDARY SCHOOLS), OR IN THE CAPACITY OF OUTSIDE SALESMAN"

1. The authority citation for part 541 is revised to read as follows:

Authority: 29 U.S.C. 213: Pub. L. 101-583, 104 Stat. 2871; Reorganization Plan No. 6 of 1950 (3 CFR, 1945-53 Comp., p. 1004); Secretary's Order No. 13-71 (36 FR 8755).

2. Section 541.5d of subpart A of part 541 is revised to read as follows:

§ 541.5d Special provisions applicable to employees of public agencies.

(a) An employee of a public agency who otherwise meets the requirement of § 541.118 shall not be disqualified from exemption under §§ 541.1, 541.2, or 541.3 on the basis that such employee is paid according to a pay system established by statute, ordinance, or regulation, or by a policy or practice established pursuant to principles of public accountability, under which the employee accrues personal leave and sick leave and which requires the public agency employee's pay to be reduced or such employee to be placed on leave without pay for absences for personal reasons or because of illness or injury of less

than one work-day when accrued leave is not used by an employee because—

(1) permission for its use has not been sought or has been sought and denied;

(2) accrued leave has been exhausted; or

(3) the employee chooses to use leave without pay.

(b) Deductions from the pay of an employee of a public agency for absences due to a budget-required furlough shall not disqualify the employee from being paid "on a salary basis" *except* in the workweek in which the furlough occurs and for which the employee's pay is accordingly reduced.

[FR Doc. 92-19878 Filed 8-18-92; 8:45 a.m.]

APPENDIX L

TRANSCRIPT OF SERGEANT GUZY'S TRIAL TESTIMONY

* * * *

[68] Q As a Sergeant, is it your understanding that you could be disciplined for insubordination or other violations of the manual?

A Yes sir.

Q And if you were disciplined could you lose pay for a day or, —

A Yes sir.

Q You could be suspended without pay?

A That is correct.

Q Has that ever happened to you?

A Yes it has.

Q Could you tell just briefly about, how you were suspended without pay or how?

A In 1990, my wife inherited a house in St. Louis County. She moved there and I maintained my apartment in the city. The department decided that I was in violation of the residency requirement and I sustained a two day suspension without pay for that.

Q You actually lost pay out of that, so,—

A I lost two days pay.

[69] Q In that work week, did you work at least one other day and get paid for it?

A Yes.

Q Okay. I don't think I have anything specific. Let me just make sure. I don't have any other questions, thank you.

THE COURT: Cross examination.

CROSS EXAMINATION

BY MR. RENICK:

Q Did you agree to that suspension, Sergeant?

A Yes I did.

Q And that was for a violation of the residency rule, is that what you said?

A That was their determination, yes sir.

Q And that rule has since been changed, has it not?

A The rule's been changed?

Q Uh-huh, the penalty is changed?

A I think the penalty's been changed, yes sir.

Q There's no longer a penalty of a suspension for a violation of that rule is there?

A I think that I believe that the only penalty they allow for that now, and that is dismissal.

* * * *

EIGHTH CIRCUIT BRIEF OF APPELLEES/CROSS APPELLANT

* * * *

However, if this Court should determine that the suspension constituted an impermissible deduction which jeopardized Sergeant Guzy's status as a salaried employee, his exempt status should not be lost. The Secretary recognized in § 541.118(a)(6) that these types of situations must be analyzed on a case-by-case basis and if the deduction is inadvertent or made for reasons other than lack of work, the exemption will not be lost if the employee is reimbursed for the deduction and the employer promises future compliance. In this instance, the penalty for violation of the residency rule had been changed long before trial. If deemed necessary, the Police Board should be given the opportunity to reimburse Sergeant Guzy for the two (2) days pay lost in 1990 as a result of the suspension so that his salaried status is unaffected.

* * * *

Supreme Court, U.S.
FILED
JAN. 5 1996
CLERK

No. 95-897

In The

Supreme Court of the United States

October Term, 1995

FRANCES BERNARD AUER, *et al.*,

Petitioners,

v.

DAVID A. ROBBINS, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION

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31PP

QUESTIONS PRESENTED FOR REVIEW

1. Are the Secretary of Labor's interpretations of the salary basis requirements for the executive and administrative exemptions in the Fair Labor Standards Act of 1938, as amended (29 U.S.C. § 213(a)(1)) ("FLSA") validly applied to public agencies like the St. Louis Metropolitan Police Department?

2. Should the salary basis requirements for the executive and administrative exemptions under the FLSA be interpreted so that the mere possibility of a disciplinary suspension which might be imposed for non-safety related reasons and which might be imposed for a period less than a full week, is sufficient for any employee or class of employees to be considered non-salaried regardless of actual experience?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

ARGUMENT 3

I. The Eighth Circuit Ruling On The Salary Test Is Misrepresented As A Minority View 3

II. Petitioners' View Of The Salary Test Requires That The Court Ignore Fourteen Years In Which No Sergeant Or Lieutenant Suffered A Deduction From Pay Based On Quantity Or Quality Of Work 5

III. The Suspension Of Sergeant Guzy Was An Isolated Incident Under Unique Circumstances Which Cannot Be Relied Upon As Evidence That Petitioners Were Not Paid On A Salary Basis 8

IV. Petitioners' View Of The Salary Test Will Produce An Absurd Result Never Intended By The Secretary Of Labor 10

CONCLUSION 12

TABLE OF AUTHORITIES

Page

CASES

Aaron v. City of Wichita, 54 F.3d 662 (10th Cir. 1995) 5

Abshire v. County of Kern, 908 F.2d 483 (9th Cir. 1990) 4

Kinney v. District of Columbia, 994 F.2d 6 (D.C. Cir. 1993) 13

Martin v. Malcolm Pirnie, Inc., 949 F.2d 611 (2d Cir. 1991) 13

McDonnell v. City of Omaha, 999 F.2d 293 (8th Cir. 1993) 4, 8

Mueller v. Reich, 54 F.3d 438 (7th Cir. 1995) 5

SEIU v. City of San Diego, 35 F.3d 483 (9th Cir. 1994), en banc denied, supp. op., 60 F.3d 1346 (9th Cir. 1995) 4

STATUTES

29 U.S.C. § 201 1

29 U.S.C. § 207 3

29 U.S.C. § 213(a)(1) 1, 13

29 U.S.C. § 216(b) 1

REGULATIONS

29 CFR § 541.1 ..... 1, 2

29 CFR § 541.2 ..... 1, 2

29 CFR § 541.5(d) 8

TABLE OF AUTHORITIES – Continued

Page

INTERPRETATIONS

29 CFR § 541.118(a) 6, 9, 10

29 CFR § 541.118(a)(5) 7, 8

29 CFR § 541.118(a)(6) 2, 11, 12, 14

STATEMENT OF THE CASE

Petitioners are or were persons holding the ranks of Sergeant or Lieutenant within the Metropolitan Police Department of the City of St. Louis, Missouri. Respondents are the members of the Board of Police Commissioners, the governing body of the police department, hereinafter referred to as the "Police Board."

This action was originally filed in 1988 by three (3) Sergeants seeking overtime pay under the Fair Labor Standards Act of 1938, as amended (29 U.S.C. § 201, *et seq.*). By the time of trial in 1993, two hundred and eighty-six (286) other Sergeants or Lieutenants were added as party Plaintiffs pursuant to the provisions of 29 U.S.C. § 216(b). That provision of the FLSA allows employees to bring an action for alleged unpaid overtime compensation for and on behalf of themselves and other employees similarly situated. In response to the claims for overtime pay, Respondents asserted the affirmative defenses that Petitioners were exempt executive or administrative employees within the meaning of 29 U.S.C. § 213(a)(1).

All Plaintiffs qualified for the "short tests" for the exemptions under 29 CFR § 541.1(f) and 29 CFR § 541.2(e)(2) because at all times relevant hereto, they were compensated at rates well in excess of Two Hundred and Fifty Dollars ($250.00) per week (Pet. App. 10a-11a). The District Court found that the method of compensation constituted a salary basis within the meaning of the aforesaid regulations. In so ruling, the court granted summary judgment for Respondents on that requirement of the "short tests" and against all Petitioners who were parties to the case at that time. Specifically, the District

Court made a finding that the record was devoid of any evidence of any Departmental procedure for deducting from or "docking" the pay of a Sergeant or higher ranking officer on an hour-by-hour basis because he or she did not work a certain number of hours (Pet. App. 71a-72a). This ruling was later applied to all Petitioners allowed to join as party Plaintiffs by the time of trial. This included Sergeant Michael Guzy.

On appeal, the Eighth Circuit Court of Appeals affirmed the District Court's determination that Sergeants and Lieutenants were paid on a salary basis. The court found it unnecessary to address the question of whether or not the Secretary of Labor's interpretations of the regulations in 29 CFR § 541.1 and 2 on the salary test were validly applied to public sector employees. With the exception of a one-time incident involving a two (2) day suspension of Sergeant Guzy, the circumstances of which were found to be "unique," the court noted there was no evidence that Sergeants or Lieutenants had actually been subjected to improper deductions from their salaries for any reason. The notion that the one-time occurrence in which Sergeant Guzy lost two (2) days pay as a disciplinary measure required a determination that all Petitioners were nonsalaried throughout the period covered by this litigation was rejected. Rather, the Eighth Circuit found that this situation fit squarely within the "window of correction" provision in 29 CFR § 541.118(a)(6) in which the Secretary of Labor has long interpreted the regulations to allow an employer to cure the effects of an improper deduction and preserve the affected employee's salaried status.

Following the Eighth Circuit decision on September 8, 1995, and the issuance of the mandate, judgment was entered for Respondents on all Petitioners' claims in the District Court on December 1, 1995 (Resp. App. 1). The Petition for Writ of Certiorari was received by Respondents' counsel on December 11, 1995.

ARGUMENT

I. The Eighth Circuit Ruling On The Salary Test Is Misrepresented As A Minority View.

All two hundred and eighty-nine (289) Petitioners have now been found to be properly classified as exempt executive or administrative employees and, therefore, not entitled to overtime pay under the FLSA. Petitioners do not challenge the holdings that their primary duty was management of a recognized subdivision of the St. Louis Metropolitan Police Department including directing the work of two (2) or more subordinate employees, in the case of the claimed executive exemption. Likewise, those Petitioners qualifying for the administrative exemption do not challenge the holdings that their primary duty consisted of office or nonmanual work directly related to management policies or the general business operations of the Department, including work requiring the exercise of discretion and independent judgment. No argument is made that Petitioners do not meet the substantive duties tests for exemption. Instead, the Petitioners who clearly hold exempt positions and perform exempt work as management and administrative employees claim they should receive additional compensation under 29 U.S.C. § 207

because they are not paid on a salary basis.[1] The sole reason for this claim is the suggestion that Petitioners are subject to deductions from their pay, in the form of suspensions for less than a full week, for violating certain Department rules or policies in the Disciplinary Code.

Prior to the trial of this case, the Eighth Circuit had already considered and rejected the argument that the possibility of an improper salary deduction alone destroys an employee's salaried status under 29 CFR § 541.1 and thereby renders him/her nonexempt for the entire period of his/her employment. *McDonnell v. City of Omaha*, 999 F.2d 293 (8th Cir. 1993). The petition for writ of certiorari was denied in the *McDonnell* case and there is no reason why the result should be any different in this case. 1145 S.Ct. 1188 (1994). In *McDonnell*, the court noted that the Ninth Circuit which had previously taken a very strict approach to interpreting the salary test in *Abshire v. County of Kern*, 908 F.2d 483 (9th Cir. 1990), failed to consider the difference between private and public sector employees. Since then, the Ninth Circuit reconsidered its position and found the salary basis test, as interpreted by the Secretary of Labor, to be invalid for public sector employees. *SEIU v. City of San Diego*, 35 F.3d 483 (9th Cir. 1994), en banc denied, supp. op., 60 F.3d 1346 (9th Cir. 1995).

Certainly, there is far less confusion and far less of a conflict between the Circuit Courts of Appeals on this

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[1] Petitioners continue to ignore the admissions made by the three (3) original party Plaintiffs, in response to Respondents' Request for Admissions early on in this litigation, that they were paid on an annual salary basis.

narrow issue of law than Petitioners have represented. No longer can the Ninth Circuit be counted as approving of the interpretation urged by Petitioners. In the most recent Seventh Circuit decision on the subject, *Mueller v. Reich*, 54 F.3d 438 (7th Cir. 1995), the court held that disciplinary suspensions of less than a full week could cause public as well as private sector employees to lose their salaried status but the court did not hold that the mere possibility of such an action was sufficient to jeopardize salaried status. Petitioners agree that the Fifth and Eleventh Circuits have aligned with the Eighth Circuit against their interpretation of the salary basis test and the Tenth Circuit chose not to accept their interpretation in *Aaron v. City of Wichita*, 54 F.3d 662 (10th Cir. 1995). Admittedly, the D.C. Circuit seems to be confused on this issue. However, several circuits have not addressed this issue at all. Thus, the suggestion that the Eighth Circuit's holding in this case is a minority view does not comport with the current state of the law.

II. Petitioners' View Of The Salary Test Requires That The Court Ignore Fourteen Years In Which No Sergeant Or Lieutenant Suffered A Deduction From Pay Based On Quantity Or Quality Of Work.

In any event, the facts of this case demonstrate just how absurd and inequitable Petitioners' interpretation of the regulations requiring that exempt executive and administrative employees be paid on a salary basis can be. First of all, Sergeants and Lieutenants employed by the St. Louis Metropolitan Police Department are paid amounts designated as annual salaries which are fixed by Missouri statute. It was in 1979 when officers holding the

rank of Sergeant and above were converted to a straight salary compensation basis. All such officers received an eight percent (8%) increase in compensation at that time in recognition of the fact that they would no longer receive compensatory time off, overtime pay, or other forms of additional compensation regardless of the hours they worked (Pet. App. 45a). Since 1979, Sergeants have received a predetermined amount constituting all their compensation from the Police Department each biweekly pay period, regardless of how much time they spent working on any particular day during the pay period (Pet. App. 43a-46a; 29 CFR § 541.118(a)). Not one (1) of the two hundred and eight-nine (289) Petitioners testified by deposition or at trial that he/she had ever suffered a deduction from his/her salary based on the quantity or quality of work performed.

This case was filed in late 1988 and Petitioners alleged violations of the FLSA back to April 15, 1986, the date the FLSA amendments of 1985 (Pub. Law 99-150) extending coverage to public employers became effective. The case was tried in September, 1993. Yet, in that period of more than seven (7) years, Petitioners were unable to show a single example of a deduction from their pay for a partial day absence. In fact, the Department's Paymaster testified by deposition in 1989 that in the previous twenty-four (24) years, no Sergeant's pay had been docked for an absence of less than a day. Hours worked were not even tracked for Sergeants (Resp. App. 2-8).

In theory, a Sergeant was subject to discipline under Rule 7.004(c) for withdrawing or absenting himself/herself from duty without leave and the penalty could be a suspension of less than a full week (Pet. App. 147a). Even

though there had been no such occurrence between 1965 and 1989 and no evidence of any such occurrence prior to August 19, 1992 when the Secretary of Labor finally amended the regulations to allow public agencies to make deductions for partial day absences, Petitioners maintain that the mere existence of the possibility of various events resulting in an improper deduction should have rendered all Sergeants nonexempt because they were not salaried. Obviously, such a result defies common sense and exalts form over substance.

It is difficult to imagine a better set of circumstances with which to demonstrate the absolute absurdity of Petitioners' legal position than those presented by this case. Technically, any Sergeant or Lieutenant was subject to a deduction from his predetermined biweekly compensation if he/she had been absent without leave because the discipline which might have been imposed could have included a suspension of less than a full work week. There is no evidence that it ever happened in the twenty-eight (28) years prior to trial but that is of no consequence to Petitioners. They argue that the Eighth Circuit should have ignored actual experience and held that they were not paid on a salary basis because sometime, somewhere, somehow, some Sergeant might possibly suffer a reduction in pay due to a disciplinary suspension which might be less than a full week, for violation of a Departmental rule or policy which might not be directly related to safety. 29 CFR § 541.118(a)(5).[2] The Eighth Circuit has

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[2] Petitioners make much of the fact that the Secretary of Labor made some changes in the salary test as applied to public agencies but did not change the interpretation on disciplinary

determined in this case and the *McDonnell* case that it is unwilling to provide a windfall for public employees based on a series of contingencies when no allegedly improper deduction has been made.

III. The Suspension Of Sergeant Guzy Was An Isolated Incident Under Unique Circumstances Which Cannot Be Relied Upon As Evidence That Petitioners Were Not Paid On A Salary Basis.

In this case, Petitioners continue to claim that Sergeant Michael Guzy was the victim of an improper deduction from his salary in 1990. Respondents suggest that their reliance on the Guzy incident indicates just how tenuous the claims that all two hundred and eighty-nine (289) Petitioners were nonsalaried really are. Two hundred and eighty-eight (288) Petitioners could not come up with one (1) single instance in their entire work histories as Sergeants and Lieutenants when they actually suffered a disciplinary deduction in pay for violation of a nonsafety related Department rule. There are more than forty (40) such rules according to Petitioners and Petitioners have been paid on a salary basis according to Missouri law since 1979. Yet, the sum total of evidence adduced at

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deductions for nonsafety related rule violations. Their argument ignores the fact that Section 541.118(a)(5) was not open for comment during the rulemaking procedure which resulted in the promulgation of Section 541.5(d). The Department expressly stated:

> However, the Department expects to consider this issue as appropriate in proposed revisions of Part 541 at a later date.

(Pet. App. 210a).

trial in 1993 to show that Sergeants and Lieutenants suffered allegedly improper deductions from their salaries is a two (2) day suspension to which Sergeant Guzy agreed as part of a negotiated settlement to avoid discharge. Had the Department proceeded to fire Guzy, as originally intended, for allegedly violating the city residency requirement, he would have been considered a salaried, exempt ex-employee.

Because the Department allowed Guzy to save his job by a "plea bargain" which, in part, resulted in a two (2) day suspension, Sergeant Guzy and his two hundred and eighty-eight (288) fellow Petitioners did not suddenly become nonexempt employees entitled to overtime pay back to 1986. This was clearly a unique situation and one which has not recurred and cannot recur because of a 1991 change to the Disciplinary Code. Thus, if Sergeant Guzy was found to have violated the Department's residency rule at any time since 1991, his employment would have been terminated. If his suspension constituted an improper deduction from his salary, as the Eighth Circuit seemingly held without deciding the validity of Section 541.118(a) as applied to Respondents, it would be more logical under the circumstances to allow Respondents to rescind the suspension and terminate Guzy's employment rather than use this incident as a basis for a determination that Petitioners were not paid on a salary basis.

Respondents maintain that the suspension in no way affected Sergeant Guzy's salaried status. In Section 541.118(a), the Secretary of Labor has interpreted payment on a salary basis to mean that an employee is paid a predetermined amount each pay period and that amount may not be subject to reduction based on quantity or

quality of work. The reduction in Sergeant Guzy's salary in one (1) week in 1990 had nothing to do with either the quantity or quality of his work. Thus, Petitioners' argument that an employee need only be subject to a reduction in salary under Section 541.118(a) to lose his/her salaried status does not even apply to this set of facts. Without the Guzy suspension, Petitioners are left with a hollow argument based on a pure technicality when in fact there is no evidence that any Sergeant or Lieutenant ever lost so much as one (1) hour of pay because of variations in the quantity or quality of work performed.

IV. Petitioners' View Of The Salary Test Will Produce An Absurd Result Never Intended By The Secretary Of Labor.

If Petitioners' argument that the mere possibility a salaried executive or administrative employee could be suspended for less than a week as a disciplinary measure for nonsafety related conduct converts him/her to nonsalaried and, therefore, nonexempt status under the FLSA is accepted, how could any such employee in the public or private sector be considered exempt? Is it not always possible that any employer, regardless of the existence of disciplinary rules or policies, could suspend a manager or administrator for one (1) day or two (2) days for work related conduct or performance reasons? Is the Chief of the entire St. Louis Metropolitan Police Department a nonexempt employee who must be paid overtime compensation like hourly employees simply because it is possible that he might be suspended for less than a week by the Board of Police Commissioners as a disciplinary measure? Is it not possible that any president of any

major corporation could be suspended for two (2) days by the corporate board of directors if the board was unhappy with his/her performance? The logical extension of Petitioners' interpretation of the salary test has to be that no employee can be considered exempt because it can always be said that it is possible he/she will suffer an improper deduction in pay at the employer's discretion. Such an interpretation is nonsense and could not have been intended.[3]

The Secretary of Labor has explicitly recognized that even if an impermissible deduction is made from an employee's salary, the employee is not automatically converted to nonexempt status. 29 CFR § 541.118(a)(6). Instead, the Secretary recognizes that the facts of each particular case must be reviewed before a determination can be made as to the effect of the deduction. In this case, the Eighth Circuit considered the two (2) day suspension of Sergeant Guzy, arguably, to be an impermissible deduction but one that did not destroy his exempt status. Clearly, the deduction from his salary was made for reasons other than lack of work and it was an isolated incident which could not recur because of a change in the Disciplinary Code.

As noted by Petitioners, Respondents requested in their brief on appeal, the opportunity to reimburse Sergeant Guzy for the two (2) days pay he lost in 1990 if deemed necessary. As noted herein, Respondents had not

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[3] It should not go unnoticed that not one (1) of the cases relied upon by Petitioners for their position that merely being subject to an improper disciplinary deduction results in the loss of salaried status, was filed by the Secretary of Labor.

conceded that the suspension of Guzy in lieu of discharge constituted an impermissible deduction. However, the Eighth Circuit opinion indicates that the Guzy incident fits within the "window of correction" criteria in Section 541.118(a)(6) which would require reimbursement. Petitioners have emphasized that Sergeant Guzy had not received reimbursement for the period of his suspension as of the date their Petition was filed. Yet, they have not pointed to any requirement that reimbursement be accomplished prior to the time this litigation is concluded. It was not until December 1, 1995 that an Order granting judgment to Respondents in accordance with the Eighth Circuit opinion was entered. In that Order, Petitioners were directed to pay the costs on appeal but they have yet to do so. Respondents have every expectation that Petitioners will reimburse them for the costs at the appropriate time. Conversely, Petitioners can rest assured that Sergeant Guzy will be appropriately reimbursed if the Eighth Circuit decision remains undisturbed. There is no basis for Petitioners to suggest otherwise to this Court.

CONCLUSION

Petitioners have demonstrated no compelling reasons why review on Writ of Certiorari is warranted in this case. If the Court believes that the broader problems presented by the interpretation and application of the salary test to executive and administrative employees of public agencies requires resolution, it has other cases pending in which petitions have specifically and directly raised those issues.

The substantive issues raised by Petitioners in this case are extremely narrow. Contrary to the representations of Petitioners, few courts have actually addressed the narrow question of whether or not just being subject to disciplinary action, which could include a suspension for less than a full week, deprives an otherwise exempt executive or administrative employee of salaried status. Some of the decisions, such as *Kinney v. District of Columbia*, 994 F.2d 6 (D.C. Cir. 1993) and *Martin v. Malcolm Pirnie, Inc.*, 949 F.2d 611 (2d Cir. 1991), which Petitioners cite as evidence of a conflict among the Circuit Courts of Appeal, do not even deal with the question of disciplinary suspensions. Instead, they deal with questions of deductions or contingent deductions for partial day absences, an issue which Petitioners have abandoned in this case.

The Eighth Circuit decision on the facts of this case is not in conflict with the Fair Labor Standards Act, the regulations promulgated pursuant to 29 U.S.C. § 213(a)(1), or even the Secretary of Labor's interpretations of the regulations. The suggestion by Petitioners that the decision on the salary test is unreasonable itself defies reason. Petitioners urge that the Eighth Circuit was wrong because the panel did not ignore the facts that two hundred and eighty-eight (288) of the two hundred and eighty-nine (289) Petitioners had never been subjected to any alleged improper deduction from their salaries during the fourteen (14) year period prior to trial that they were paid on a salary basis. The one-time incident involving one (1) Sergeant would not have occurred if Respondents had not relented and carried out the disciplinary penalty originally imposed. That unique circumstance

could not reasonably be used as a basis to find that all Petitioners are and have been nonexempt employees entitled to additional overtime pay back to 1986. Such a result would be absurd. Even the Secretary of Labor recognized in Section 541.118(a)(6), as did the Eighth Circuit, that an employee or an entire classification of employees does not lose their salaried status just because a deduction is made which is judged to be impermissible.

As for Petitioners' argument that the mere possibility of a deduction from their salaries for nonsafety related rule violations makes them nonsalaried employees, it is readily apparent that such a blanket ruling would produce an even more absurd result. If the "mere possibility" standard is adopted, the white collar exemptions in the FLSA requiring that employees be salaried will be rendered meaningless. That cannot have been the intent of the Secretary of Labor in interpreting the salary basis requirement nor does it comport with common sense. The Eighth Circuit approach, on the other hand, clearly does make sense without undermining the purposes of the FLSA. The decision in this case should not be disturbed.

WHEREFORE, for the reasons stated herein, Respondents respectfully request the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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APPENDIX

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

FRANCES BERNARD AUER, et al.,	)	
Plaintiff(s),	)	**No. 4:88CV02071 GFG**
vs.	)	
ANNE MARIE CLARKE, et al.,	)	
Defendant(s).	)	

ORDER

(Filed Dec. 1, 1995)

This matter is before the Court after affirmance with respect to the issues raised in the appeal and reversal with respect to the issue raised in the cross-appeal by the United States Court of Appeals for the Eighth Circuit. *Auer v. Robbins*, Nos. 94-3355/3534, slip op. (8th Cir. Sept. 8, 1995).

IT IS FURTHER ORDERED that defendants' motion for entry of judgment or, in the alternative, for leave to file bill of costs shall be and it is granted.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that defendants shall have judgment on their cross-appeal.

IT IS FURTHER ORDERED that as directed by the Eighth Circuit, appellees/cross-appellants shall recover from the appellants/cross-appellees the sum of $331.55 as taxable costs on appeal.

Dated this 1st day of December, 1995.

/s/ George F. Gunn, Jr.
GEORGE F. GUNN, JR.
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

FRANCES BERNARD AUER, et al., Plaintiff(s), vs. ROBERT BAER, et al., Defendant(s).	)	Cause No. 88-2071-C-4

DEPOSITION OF WITNESS, ROSALIE CORTELYOU, produced, sworn and examined on the part of the Plaintiffs, pursuant to agreement, and pursuant to the following stipulation between the hours of eight o'clock in the forenoon and six o'clock in the afternoon of Friday, September 1, 1989, at the St. Louis Metropolitan Police Department, 1200 Clark Avenue, 6th Floor, in the City of St. Louis, State of Missouri, before me,

LINDA M. DATTILO
Certified Shorthand Reporter
of
CLAYTON REPORTING COMPANY, LTD.,

a Notary Public in and for the County of St. Louis, State of Missouri, in a certain cause now pending in the United States District Court, Eastern District of Missouri, Eastern Division, wherein FRANCIS BERNARD AUER, et al. are the Plaintiffs and ROBERT BAER, et al. are the Defendants.

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By: Mr. John B. Renick

Stipulation

Before the taking of the within deposition, the parties, by their counsel, stipulate and agree that same is being taken pursuant to agreement. Counsel further stipulate same may be taken in stenotype and thereafter typed, signature of the witness being expressly waived by consent of counsel and the witness in his own behalf and regularly filed in the case with the same force and effect as though notice had been given.

ROSALIE CORTELYOU,

being produced, sworn and examined on behalf of the Plaintiffs, deposeth and saith:

DIRECT EXAMINATION

BY MR. RIVERA:

Q. Ma'am, could you please state your full name. You can go by your nickname.

A. It's Rosalie Cortelyou.

Q. And Ms. Cortelyou, where do you reside?

A. 2533 Mariner.

Q. And is that in St. Louis City?

A. St. Louis County, 63129.

Q. And where are you currently employed?

A. I'm in the Office Of Budget Finance as the department paymaster.

Q. And how long have you been in that position?

A. Twenty-four years.

Q. You've been the paymaster for twenty-four years?

A. Yes.

Q. How long with the department total?

A. Twenty-five.

Q. What – can you tell me what your duties are as the paymaster?

A. My duty hours?

Q. No. What your duties are. What do your duties consist of?

A. It's to maintain the records of payment of shift and overtime for commissioned and civilian employees of the police department.

Q. What else do you do, anything else other than that? I mean, I realize it's a lot, but I'm just trying to get a categorization of your duties.

A. We make sure the deductions are correct, we distribute the checks, in charge of the duty roster. I don't know how specific you want to get.

Q. Okay. If you – if a person wants a deduction, say, for the United Way, for example, that would go through your office?

A. The authorization cards eventually hit our office, yes.

Q. And does your office do the actual docking? Say a police officer, a regular patrolman, gets docked, say, three hours pay. Would your office be the one to do that?

A. We would get the source document, yes, and our office would dock him.

Q. Would you – You normally on your own don't dock the officer; it's usually somebody instructs you that this officer will be docked and you do the paperwork to dock his pay?

A. That's correct.

Q. And you've got no authority to dock or adjust the pay on your own, other than based on information provided to you you make the adjustments?

A. That's correct.

Q. Are you then in charge of all the overtime to be paid to the police officers?

A. Yes.

Q. Now are there any sergeants in this

* * *

bank and he takes off four hours of the day, would you still take the two hours of overtime from him?

A. If the sergeant submitted the slip we would take the time. He is making the application for that time to take off.

Q. But if it's denied and he takes off anyway, would they still take those two hours of overtime? In other words, if the captain says, no, you can't go off and he leaves, you would still dock him the two hours of overtime, wouldn't you?

A. Not if he didn't fill our the slip. Then he's subject to disciplinary action. Whenever they fill out a slip it's because they are requesting the time off.

Q. Now you testified that nobody – no sergeant to your knowledge has ever been docked –

A. – That's correct.

Q. – for less than a day, but can they be docked for less than a day?

A. For disciplinary –

Q. For not working. Can anybody be docked for not working less than a day?

A. I can't answer that. That's –

Q. Do you know? You don't know or – Your testimony has been that it's never happened and you've never seen it happen?

A. That's correct.

Q. I just want to know from you, can that happen, you get an order from somebody that says dock this sergeant three hours and don't pay him for three hours?

A. It can happen only through disciplinary proceedings from the board of police commissioners. I cannot have a captain call me and say dock this man three hours without documentation. We would not do that.

MR. RIVERA: That's all the questions I have.

MR. KOSTER: I'm not finished.

RECROSS-EXAMINATION

BY MR. KOSTER:

Q. If a sergeant had four hours of overtime left in his bank and he had an excused absence by his commander for a day, would you take the four hours of overtime away from him or would you just leave it sit there?

A. The overtime will sit there unless he filled out a blue slip, an overtime slip. We would not take anything away from him.

Q. So you wouldn't take his overtime away?

• • •

A. Correct.

Q. And that's for patrolmen?

A. Patrolmen.

Q. Now as far as sergeants are concerned, you don't keep track of their hours worked?

A. No.

Q. You don't care how many hours sergeants do work or don't work, you're going to pay them their biweekly salary every two weeks?

A. That's correct.

Q. When a man leaves an hour early to get his hair cut, goes to the dentist, works half a day, whatever, you're going to pay him his biweekly salary, correct?

A. Correct.

Q. And there is no policy of the department that you're aware of to make a deduction from that salary based on a number of – because the individual takes off some particular number of hours, correct?

A. Correct.

Q. So what's the significance – the significance of these hours of overtime that an individual has as a patrolman and he becomes a sergeant and he has this

bank – that really has no significance to you in terms of whether or not you're

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Supreme Court, U.S.
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No. 95-897

In the Supreme Court of the United States

OCTOBER TERM, 1995

FRANCES BERNARD AUER, ET AL., PETITIONERS

v.

DONALD A. ROBBINS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

Regulations promulgated by the Secretary of Labor provide that employees are considered to be paid on a "salary basis," and therefore may be "executive," "administrative," or "professional" employees exempt from the overtime requirements of the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 201 *et seq.*, if they are paid a predetermined amount, on a weekly or less frequent basis, that "is not subject to reduction because of variations in the quality or quantity of the work performed." 29 C.F.R. 541.118(a). In addition, 29 C.F.R. 541.118(a)(6) provides a "window of correction" under which an employer that has made a deduction from an employee's pay that would remove the employee from salary basis status for FLSA purposes may retroactively restore the employee's exempt status by reimbursing the employee and promising to comply with the salary basis rule in the future. The questions presented are:

1. Whether petitioners' pay is "subject to" reduction within the meaning of 29 C.F.R. 541.118(a), when respondents have a policy that permits disciplinary suspensions of less than one week, but the policy has been implemented only once under unique circumstances.

2. Whether an employer that has a policy that permits disciplinary suspensions may take advantage of the window of correction to remedy a one-time disciplinary deduction that occurred under unique circumstances.

TABLE OF CONTENTS

	Page
Statement	1
Discussion	7
Conclusion	19

TABLE OF AUTHORITIES

Cases:

Abshire v. *County of Kern*, 908 F.2d 483 (9th Cir. 1990), cert. denied, 498 U.S. 1068 (1991) 11, 13, 17
Atlanta Professional Firefighters v. *City of Atlanta*, 920 F.2d 800 (11th Cir. 1991) 11
Bankston v. *Illinois*, 60 F.3d 1249 (7th Cir. 1995) 11, 12, 14
Barner v. *City of Novato*, 17 F.2d 1256 (9th Cir. 1994) 12
Bowles v. *Seminole Rock & Sand Co.*, 325 U.S. 410 (1945) 15
Braxton v. *United States*, 500 U.S. 344 (1991) 15
Gardebring v. *Jenkins*, 485 U.S. 415 (1988) 15
Hurley v. *Oregon*, 27 F.3d 392 (9th Cir. 1994) .. 11, 12, 13
Idaho Metal Works v. *Wirtz*, 383 U.S. 190 (1966) ... 10
Kinney v. *District of Columbia*, 994 F.2d 6 (D.C. Cir. 1993) 11
Klein v. *Rush-Presbyterian-St. Luke's Medical Ctr.*, 990 F.2d 279 (7th Cir. 1993) 9, 11, 12, 13, 16, 17
Martin v. *Malcolm Pirine, Inc.*, 949 F.2d 611 (2d Cir. 1991), cert. denied, 506 U.S. 905 (1992) 6, 11 13, 15, 16, 17
McDonnell v. *City of Omaha*, 999 F.2d 293 (8th Cir. 1993), cert. denied, 114 S. Ct. 1188 (1994) 6
Michigan Ass'n of Governmental Employees v. *Michigan Dep't of Corrections*, 992 F.2d 82 (6th Cir. 1993) 11, 12, 13

Cases—Continued: Page

Shockley v. *City of Newport News*, 997 F.2d 18 (4th Cir. 1993) 9, 11, 12

York v. *City of Wichita Falls*, 944 F.2d 236 (5th Cir. 1991) 11

Constitution, statutes and regulations:

U.S. Const. Amend. XI 8

Fair Labor Standards Act of 1938, 29 U.S.C. 201 *et seq.*:

§ 7(a)(1), 29 U.S.C. 207(a)(1) 1

§ 13(a)(1), 29 U.S.C. 213(a)(1) 1, 5, 7

29 C.F.R.:

Section 541.1 2

Section 541.1(f) 2

Section 541.2 2

Section 541.2(e)(1) 2

Section 541.3 2

Section 541.3(e) 2

Section 541.5d 3

Section 541.118(a) 2, 9, 16

Section 541.118(a)(2) 3

Section 541.118(a)(3) 3

Section 541.118(a)(5) 2

Section 541.118(a)(6) 4, 15

Miscellaneous:

Salary Basis, Wage & Hour Manual (BNA) 99:5257 (Dec. 24, 1991) 16

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This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

1. Section 7(a)(1) of the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 207(a)(1), requires an employer to pay each of its employees "at a rate not less than one and one-half times the regular rate at which he is employed" for all hours worked in excess of 40 hours a week. Section 13(a)(1) of the Act, 29 U.S.C. 213(a)(1), provides an exemption from the requirement of overtime pay for "any employee employed in a bona fide executive, administrative, or professional capacity * * * (as such terms are

defined and delimited from time to time by regulations of the Secretary [of Labor])."

Regulations promulgated by the Secretary provide that, in order to qualify for professional, executive or administrative status, an employee must meet both a salary basis and a duties test. See 29 C.F.R. 541.1 (executive), 541.2 (administrative), 541.3 (professional). This case concerns only the salary basis test.

Under the salary basis test, an employee generally does not qualify as a bona fide executive, administrative, or professional employee if the employee is paid hourly or piecework wages rather than a salary. 29 C.F.R. 541.1(f) (bona fide executive employee must be "compensated for * * * services on a salary basis" at no less than a specified rate); *id.* at 541.2(e)(1) (same for administrative employee); *id.* at 541.3(e) (same for professional employee). An employee is considered to be paid on a salary basis if the employee "regularly receives * * * a predetermined amount" of compensation that "is not subject to reduction because of variations in the quality or quantity of the work performed." 29 C.F.R. 541.118(a). As a general rule, a "salary basis" employee "must receive his full salary for any week in which he performs any work without regard to the number of days or hours worked," but need not be paid for any week in which he performs no work. *Ibid.*

The regulations provide exceptions to that rule. One exception is that an employer may impose penalties for infractions of safety rules of major significance without affecting an employee's salaried status. 29 C.F.R. 541.118(a)(5). Suspensions for infractions of work rules that are not major safety rules, however, are governed by the general salary basis test set forth in 29 C.F.R. 541.118(a). Thus, an

employee suspended without pay for less than one week for a violation of a rule that is not a major safety rule would ordinarily be classified as unsalaried. On the other hand, an otherwise salaried employee who is suspended without pay for one week for the violation of such a rule would remain a salaried employee.[1]

The regulations further provide, in a subsection commonly referred to as the "window of correction," that an employer who has made a deduction that runs afoul of the salary basis rule may take corrective action to restore retroactively the employee's exempt status. The "window of correction" regulation states in pertinent part:

> Where deductions are generally made when there is no work available, it indicates that there was no intention to pay the employee on a salary basis. In

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[1] In addition to permitting unpaid disciplinary suspensions as penalties for violations of major safety rules, the salary basis regulation permits deductions from a salaried employee's compensation to reflect absences of "a day or more" for personal reasons other than sickness and accident (29 C.F.R. 541.118(a)(2)) and to reflect absences for "a day or more" due to sickness or disability if "made in accordance with a bona fide plan, policy or practice of providing compensation for loss of salary occasioned by both sickness and disability" (*id.* at 541.118(a)(3)). The regulation does not permit docking an employee's pay for partial day absences. In August 1992, however, the Secretary promulgated a special rule for state and local government employees that permits public employees who otherwise meet the salary basis test to be subject to deductions for partial-day absences "according to a pay system established by statute, ordinance, or regulation, or by a policy or practice established pursuant to principles of public accountability." 29 C.F.R. 541.5d. That regulation does not alter the treatment of disciplinary deductions for public employees.

> such a case the exemption would not be applicable to him during the entire period when such deductions were being made. On the other hand, where a deduction not permitted by these interpretations is inadvertent, or is made for reasons other than lack of work, the exemption will not be considered to have been lost if the employer reimburses the employee for such deductions and promises to comply in the future.

29 C.F.R. 541.118(a)(6).

2. Petitioners are a group of police sergeants and one police lieutenant employed by the St. Louis Police Department. Pet. App. 6a, 36a. During the pertinent time frame, state law has provided that St. Louis police sergeants receive a yearly salary and has specified that officers at the rank of sergeant or higher are allowed no overtime pay. *Id.* at 6a & n.1, 43a-46a.

The St. Louis Board of Police Commissioners has issued a Police Manual that specifies standards of conduct by which police officers must abide. Pet. App. 102a, 107a-117a. The penalties for violating some of those standards include disciplinary suspensions without pay. See, *e.g.*, *id.* at 148a, top of col. 3 (penalty for first offense of "failing to properly patrol assigned beat" is "[r]eprimand to 5 days"). The St. Louis Police Department has imposed a disciplinary suspension without pay on a sergeant, however, in only one instance. In 1990, two years after this lawsuit was filed, the police department charged a sergeant with violation of the city residency requirement and recommended that he be dismissed. *Id.* at 10a. Under an agreement with the city, the sergeant waived his right to a hearing and accepted, in lieu of dismissal, a

two-day suspension without pay. *Ibid.* In 1991, the department changed its policy to provide that termination is the exclusive sanction for violation of the residency requirement. *Ibid.*

3. Petitioners brought this action in 1988 against respondents, the members of the St. Louis Board of Police Commissioners, alleging that respondents denied them overtime compensation in violation of the FLSA. Pet. App. 6a, 36a-37a. Respondents asserted that petitioners were administrative or executive employees within the meaning of Section 13(a)(1) and therefore exempt from the FLSA's overtime requirements. *Ibid.*

On cross motions for partial summary judgment, the district court ruled that the lieutenant petitioner performed primarily management duties, that lieutenants and sergeants were salaried rather than hourly employees, and that there were genuine issues of disputed fact as to whether sergeants met the duties component of the test for executive or administrative employees. Pet. App. 6a-7a, 71a-74a. The court therefore held that the lieutenant petitioner was exempt under Section 13(a)(1), Pet. App. 74a, and that the case should proceed to trial on the question whether the sergeants satisfied the duties component of the test for executive or administrative employees. After trial, the district court ruled that twenty categories of sergeants were exempt under Section 13(a)(1) and that two categories of sergeants were partially exempt. Pet. App. 6a-7a, 47a-62a, 64a-65a.

4. The court of appeals affirmed in part and reversed in part, holding that all categories of sergeants were exempt under Section 13(a)(1). Pet. App. 1a-35a. The court rejected petitioners' argument that they were not paid on a "salary basis" within the

meaning of the Secretary's regulations because respondents' disciplinary policy authorizes less than one-week suspensions without pay for violations of rules that are not safety rules of major significance. The court held that, under Eighth Circuit precedent, "[t]he mere possibility of an improper deduction" from pay does not defeat an employee's salaried status under the Secretary's regulations. *Id.* at 8a (citing *McDonnell* v. *City of Omaha*, 999 F.2d 293, 296 (8th Cir. 1993), cert. denied, 114 S. Ct. 1188 (1994)).

The court of appeals also rejected petitioners' contention that they were not exempt employees because respondents had suspended one sergeant for two days without pay for violating a residency requirement. Because a residency requirement is not a safety rule of major significance, the court concluded that the sergeant's two-day suspension without pay was inconsistent with the Secretary's salary basis regulation and "arguably" required that the sergeant be treated as a nonsalaried employee. Pet. App. 9a. The court concluded, however, that such a one-time improper deduction did not mean that *all* sergeants should be considered nonsalaried. *Ibid.*

The court concluded that the "window of correction" regulation permits an employer who makes an improper deduction in an employee's salary to retain the exemption when the improper deduction is a "'*one-time* or unintentional failure to adhere to § 541.118(a)'s requirements.'" Pet. App. 9a (quoting *Martin* v. *Malcolm Pirnie, Inc.*, 949 F.2d 611, 616 (2d Cir. 1991), cert. denied, 506 U.S. 905 (1992)). The court determined that, although the window is not available when an employer has a settled policy of making improper deductions from compensation, the sergeant's disciplinary loss of pay in this case had not

been made pursuant to an established policy. Pet. App. 9a-10a & n.7. The court explained that the sergeant initially faced the penalty of termination, which would not have altered his exempt salaried status, and that respondents agreed to the lesser penalty of suspension as part of an agreement in which the sergeant waived his right to a hearing. *Id.* at 10a. The court also noted that respondents had changed their policy to make termination the exclusive penalty for violations of the residency requirement, so that respondents in the future would not impose pay deductions as a penalty for violation of the rule. The court concluded that, in those circumstances, the regulations "simply require the employer to reimburse the employee for the lost wages." *Ibid.*[2]

DISCUSSION

The decision of the court of appeals is correct. Although the courts of appeals are not in full agreement on the correct interpretation of the salary basis regulations, this case does not warrant review. The facts of the case are unusual; the disagreement among the circuits is not as pronounced as petitioners suggest; and the position articulated by the Secretary in this case may eliminate uncertainty in the lower

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[2] The court of appeals also held that all of the sergeants performed primarily administrative or managerial duties, thereby satisfying the duties component of the Section 13(a)(1) exemption. Pet. App. 10a-35a. Petitioners have not sought review of that ruling. In addition, because the court held that petitioners were exempt salaried employees within the meaning of the Secretary's regulations, the court did not address the question whether the Secretary's salary basis test is valid as applied to public employers. *Id.* at 8a n.6

courts and thereby obviate any need for this Court's intervention.

1. Petitioners' first question presented (Pet. i, 11-12) is whether the Department of Labor's salary basis test for determining whether an employee is exempt from the FLSA's overtime requirements applies to state and local government employees. The court of appeals, however, did not resolve that question. Instead, it "assume[d], without deciding, that the regulation validly applies to public sector employees," Pet. App. 8a n.6, and that assumption was not adverse to petitioners. Petitioners' first question is therefore not properly presented in this case.[3]

2. Petitioners' second question (Pet. i, 14-15) seeks review of the court of appeals' holding that petitioners' salaried status is not affected by the fact that respondents' police manual permits disciplinary suspensions of less than one week for violations of rules that are not safety rules of major significance. That question does not warrant review.

a. The court of appeals correctly concluded that petitioners were salaried employees within the meaning of the Secretary's regulations. Petitioners were paid a predetermined amount every two weeks, and the district court found that there was no police department procedure for deducting pay from a

[3] For the reasons set forth in our brief in opposition to the petition for a writ of certiorari in *Wisconsin* v. *Mueller*, petition for cert. pending, No. 95-586, the disciplinary deduction component of the salary basis test at issue here is valid as applied to state and local employees, and there is no conflict in the circuits on that issue (A copy of that brief is being served on counsel of record in this case.). Thus, even if that question were properly presented in this case, review on that issue would not be warranted.

sergeant or higher-ranking officer on an hour-by-hour basis because that employee did not work a certain number of hours. Pet. App. 71a-72a.

Accordingly, the sole question is whether the discipline provisions in respondents' police manual have the effect of altering petitioners' salaried status. Under the Secretary's regulations, employees are generally considered unsalaried when their pay is "subject to reduction because of variations in the quality or quantity of the work performed," 29 C.F.R. 541.118(a), and that general rule applies when employees are "subject to" disciplinary suspensions of less than one week for violations of rules other than major safety rules. See *Shockley* v. *City of Newport News*, 997 F.2d 18, 24 (4th Cir. 1993) ("because an exception was necessary for safety rules of major significance, reductions made for infractions of other types of rules constitute reductions based on the quantity and quality of an employee's work") (collecting cases); *Klein* v. *Rush-Presbyterian-St. Luke's Medical Ctr.*, 990 F.2d 279, 285 (7th Cir. 1993) ("[w]e may logically infer that infractions of safety rules of non-major, i.e. minor, significance are not permissible under the interpretations since penalties for infractions of safety rules of major significance are"). Petitioners contend that, because respondents' manual permits unpaid suspensions of less than one week for violations of rules other than major-safety rules, petitioners are "subject to" such suspensions and therefore unsalaried. Pet. 13-15.

Although petitioners' interpretation of the regulations is not implausible, the Secretary does not interpret the "subject to" language in that way. An employee who is otherwise paid on a salaried basis does not lose that status simply because he is *theoretically*

"subject to" an unpaid suspension of less than one week for violating a rule that is not a major-safety rule. Rather, salaried status is lost under the regulations only when employees are "subject to" such a disciplinary suspension *as a practical matter*. Thus, where no deductions have actually been made, or where there have been only isolated instances in which disciplinary suspensions have occurred, or where suspensions have occurred only under unusual circumstances, employees who are not themselves suspended do not lose their salaried status. Among the factors relevant to determining whether the exemption is lost for employees who are covered by the terms of a manual that on its face permits disciplinary suspensions of less than one week, but who have not been so suspended, are: the number and type of employees covered by the policy, the number of instances of impermissible deductions, and the circumstances surrounding those deductions, *e.g.* whether they were idiosyncratic or reflected a more routine use of suspensions of less than one week. Like all exemptions in the FLSA, the employer has the burden of proving that the employees are paid on a salary basis: *e.g.* by showing that there have been only isolated instances in which disciplinary suspensions have occurred, or that suspensions have occurred only in unusual circumstances. See *Idaho Metal Works* v. *Wirtz*, 383 U.S. 190, 206 (1966).

Under the Secretary's reading of the regulations, the court of appeals correctly concluded that petitioners as a class were not subject to reduction in pay for disciplinary suspensions of less than one week for violations of rules that are not major-safety rules. While respondents' manual permits such suspensions for sergeants, only one such suspension has occurred

since 1978, Br. in Opp. 13, and that suspension occurred under "unique circumstances." Pet. App. 10a. In those circumstances, it would ignore the realities of respondents' compensation scheme to characterize petitioners as hourly-paid, rather than salaried, employees.

b. Petitioners contend (Pet. 13-14 & nn. 9-13, 1e-4e) that the decision below is consistent with decisions from the Fifth and Eleventh Circuits, see *York* v. *City of Wichita Falls*, 944 F.2d 236, 242 (5th Cir. 1991); *Atlanta Professional Firefighters* v. *City of Atlanta*, 920 F.2d 800, 805 (11th Cir. 1991), but that it conflicts with decisions from the Second, Fourth, Sixth, Seventh, Ninth, and D.C. Circuits. See *Martin* v. *Malcolm Pirnie, Inc.*, 949 F.2d 611, 615 (2d Cir. 1991), cert. denied, 506 U.S. 905 (1992); *Shockley* v. *City of Newport News*, 997 F.2d 18, 24-25 (4th Cir. 1991); *Michigan Ass'n of Governmental Employees* v. *Michigan Dep't of Corrections*, 992 F.2d 82, 85-86 (6th Cir. 1993); *Bankston* v. *Illinois*, 60 F.3d 1249, 1253 n.1 (7th Cir. 1995); *Klein* v. *Rush-Presbyterian-St. Luke's Medical Ctr.*, 990 F.2d 279, 286 (7th Cir. 1993); *Abshire* v. *County of Kern*, 908 F.2d 483, 487 (9th Cir. 1990), cert. denied, 498 U.S. 1068 (1991); *Hurley* v. *Oregon*, 27 F.3d 392, 395 n.7 (9th Cir. 1994); *Kinney* v. *District of Columbia*, 994 F.2d 6, 11 (D.C. Cir. 1993). According to petitioners (Pet. 13-14), the latter cases hold that the mere existence of a personnel manual or comparable written document that authorizes deductions in pay is sufficient to show that a class of employees is "subject to" such deductions, even if that policy is never implemented.

The divergence among the circuits is neither as clear nor as pronounced as petitioners suggest. A number of the cases relied on by petitioners involved

the question of the effect on salaried status of manual provisions that *required* a deduction of pay for *partial day absences* if an employee had exhausted permissible leave.[4] They did not involve the very different question of the effect on salaried status of manual provisions covering *disciplinary* suspensions that *permit* (but do not require) suspensions without pay for violations of rules. Courts that have concluded that salaried status is defeated by a written policy that requires deductions from pay, regardless of the extent to which the policy has been applied, may not reach the same conclusion about a manual provision that merely permits, but does not require, deductions from pay. See *Barner* v. *City of Novato*, 17 F.3d 1256, 1262-1263 (9th Cir. 1994) (drawing a distinction between a policy that requires pay docking for partial day absences and a policy that permits, but does not require, pay docking for partial day absences).

Most of the cases cited by petitioners do not squarely conflict with the decision below for other reasons as well. For example, in *Michigan Association*, the Sixth Circuit held that the employees at issue were salaried because the portion of the employer's compensation manual concerning pay docking was ambiguous and the employer's actual practice demonstrated that the true nature of the policy was not to dock employees' pay for partial day absences. 992 F.2d at 86. The court's further statement that salaried status would have been defeated if the manual clearly required pay docking for partial

[4] Only *Shockley*, *Bankston*, *Klein*, and *Hurley* do not fall within that category.

day absences was therefore dicta.[5] The courts in *Malcolm Pirnie*, *Klein*, *Abshire*, and *Hurley* did not rely exclusively on the terms of the employers' written manuals or procedures concerning deductions in pay in concluding that the employees in those cases were not salaried. In *Malcolm Pirnie*, the court also cited evidence that the employer viewed its employees as hourly, that 24 employees had amounts deducted for partial day absences, and that the remaining employees were required to deduct from personal leave time or make up the hours they missed in order to avoid salary deductions. 949 F.2d at 617. In *Klein*, which did not involve a class of employees, the court also relied on the employer's overtime and compensatory time policy, and evidence that the particular nurse seeking overtime had been suspended without pay several times for disciplinary infractions. 990 F.2d at 284-287. In *Abshire*, the court also relied on the fact that the battalion chiefs in question were eligible for overtime pay and compensatory time. 908 F.2d at 486. And in *Hurley*, the court also relied on evidence that pay was reduced on at least eight occasions. 27 F.3d at 394.

In *Shockley*, the Fourth Circuit held that reductions in pay for non-safety related disciplinary purposes defeated salaried status. 997 F.2d at 24-25. The court did not discuss, however, whether such reductions had been made or whether the absence of such

[5] Furthermore, as noted above, cases such as *Michigan Association* involved a situation in which it was alleged that the employers' actual policy *required* reductions in pay for partial-day absences, not one that merely permitted reductions for disciplinary infractions.

reductions would have made a difference in its decision. *Ibid.*

Finally, in *Bankston*, although the Seventh Circuit stated that it is not necessary to show that a deduction actually has been made from an employee's salary, it did not hold that the mere existence of a manual provision that includes a suspension without pay of less than one week among a range of possible disciplinary actions removes all employees covered by the manual from salaried status as a matter of law. Rather, the court noted that a commanding officer of the state agency had "testified that officers of the plaintiff[s'] rank may be suspended without pay for violating any [agency] rule," that the agency defendants presented no evidence to contradict that testimony, and that it therefore was reasonable for the jury to conclude that plaintiffs were not exempt employees because they were subject to being docked for pay for reasons that would violate the no docking rule. 60 F.3d at 1253.

c. For the foregoing reasons, we do not believe that there has yet emerged a sharp conflict among the circuits warranting the Court's review regarding the application of the salary basis test under the Secretary's regulation in circumstances, such as those presented here, involving a written manual provision that permits disciplinary suspensions of less than one week but in which no actual policy of imposing such suspensions has been identified. Moreover, the cases upon which petitioners rely were all decided without the benefit of a clear statement by the Department of Labor on the correct reading of its regulations. With the guidance provided by the Department of Labor in

this case, the issue may well be resolved without the need for this Court's intervention.[6]

Under established principles of administrative deference, an agency's interpretation of its own regulations must be given "controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945). Accordingly, in future cases, the courts of appeals will be guided by the Secretary's interpretation in construing the applicable regulations. Because uncertainty over the meaning of the regulations may well dissipate, there is no need for intervention by this Court at this time. Cf. *Braxton* v. *United States*, 500 U.S. 344, 347-349 (1991).

3. The third question on which petitioners seek review (Pet. i, 15-17) is whether the court of appeals was correct in holding that the "window of correction" was available to respondents in order to rectify the single improper deduction that respondents had taken from an employee's salary in this case. That question also does not warrant review.

a. Under the salary basis regulations, "where a deduction not permitted by these interpretations is inadvertent, or is made for reasons other than lack of work, the exemption will not be considered to have been lost if the employer reimburses the employee for such deductions and promises to comply in the future." 29 C.F.R. 541.118(a)(6). In *Malcolm Pirnie*,

---

[6] The Court has been "properly hesitant" to reject a federal agency's interpretation of its own regulations that is expressed for the first time in litigation involving other parties unless an alternative reading is compelled by the regulation's plain language or by other indications of the Secretary's intent at the time of the regulation's promulgation. See *Gardebring* v. *Jenkins*, 485 U.S. 415, 429-430 (1988).

949 F.2d at 616, the Second Circuit interpreted that provision to "permit[] employers to treat otherwise eligible employees as salaried, regardless of the employer's one-time or unintentional failure to adhere to § 541.118(a)'s requirements." In 1991, the Department of Labor's Wage and Hour Division issued an opinion letter agreeing with the Second Circuit that an employer that has made a "one-time disciplinary deduction" would be eligible for the window of correction. *Salary Basis*, Wage & Hour Manual (BNA) 99:5257 (Dec. 24, 1991).

Because this case involves a "one time" deduction, the court of appeals correctly concluded that respondents could take advantage of the window of correction to restore the salaried status of the one sergeant who was disciplined without pay for violating respondents' residency requirement. As long as respondents reimburse the affected employee and promise to comply in the future, the sergeant who was disciplined would not be entitled to overtime pay.[7]

b. Petitioners argue (Pet. 16) that the decision below conflicts with *Malcolm Pirnie* and *Klein*. According to petitioners, those decisions hold that the window of correction is available only when no formal written policy provides for deductions. As noted above, however, *Malcolm Pirnie* interpreted the window of correction regulation to permit an employer to correct a "one-time" improper deduction despite the existence of a written policy. The employer in

[7] Because the employees other than the sergeant were not subject to disciplinary deductions in the first place, they would retain their status as salaried employees, regardless of whether respondents exercise their option to retroactively restore the salaried status of the sergeant who was suspended.

Malcolm Pirnie could not take advantage of that interpretation, because the employer had made deductions for partial days absences in a significant number of cases. 949 F.2d at 616-617. There is therefore no conflict between *Malcolm Pirnie* and the decision below. Similarly, the court in *Klein* held that the employer could not take advantage of the window of correction because the employer had suspended the employee involved in that case several times. 990 F.2d at 287. The court in *Klein* noted that other courts had concluded that the window could not be used when "the impermissible deductions were pursuant to an express policy and thus were not inadvertent." *Ibid.* The court did not have occasion to consider, however, whether an employer that has a written manual that permits disciplinary deductions could take advantage of the window of correction to remedy a one-time use of such a deduction.[8]

c. In any event, this case does not present an appropriate vehicle for resolving the question whether an employer may take advantage of the window of correction to remedy a one-time deduction that is made pursuant to a formal policy that permits disciplinary deductions. The court below concluded that the one-time disciplinary deduction at issue in this case was not made "pursuant to an established policy." Pet. App. 10a. Instead, the court concluded

[8] *Abshire* also does not squarely conflict with the decision below. In that case, the court concluded that the window of correction is "for an employer that makes a one-time improper deduction and then corrects its error." 908 F.2d at 489. The court also stated that the window is not available when an employer has adopted an express policy that conflicts with the salary basis rule and has continued to adhere to such a policy. *Ibid.*

that the deduction was made pursuant to a unique settlement in which respondents agreed not to fire the sergeant and the sergeant agreed to a two-day suspension without pay. The court's fact-bound conclusion that the deduction at issue in this case was not made pursuant to an established policy raises no issue of general importance and therefore does not warrant this Court's review.[9]

---

[9] Petitioners complain (Pet. 17) that the court of appeals did not require reimbursement to the affected employee as a condition of dismissal of the suit. Respondents, however, unequivocally state in their response to the petition (Br. in Opp. 12) that they intend to reimburse the affected sergeant. It is therefore unnecessary for the Court to consider that issue. Petitioners also contend (Pet. 16-17) that the court of appeals should have required respondents to modify their entire disciplinary code, not just the portion dealing with the residency requirement. The court of appeals' resolution of that narrow question does not raise any issue of general importance and does not conflict with the decision of any other court of appeals. Review of that issue is therefore not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1996

(5)

Supreme Court, U.S.
FILED
AUG 28 1996
CLERK

No. 95-897

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

FRANCIS BERNARD AUER, *et al.*,
Petitioners,
v.
DAVID A. ROBBINS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

JOINT APPENDIX

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PETITION FOR CERTIORARI, FILED DECEMBER 7, 1995
CERTIORARI GRANTED, JUNE 24, 1996

99 pp

TABLE OF CONTENTS

	Page
Relevant Docket Entries	1
Documents:	
Plaintiffs' Answer to Defendants' Second Interrogatories, October 26, 1989, #12, #13 and #14	3
Plaintiffs' Admission, December 16, 1988 and April 11, 1989, #3	6
Plaintiffs' Statement of Facts Not in Dispute, April 6, 1990, para. 8 and 9	11
Joint Stipulations of Uncontested Facts, September 15, 1993, #2, #10, and #11	13
St. Louis Metropolitan Police Department, Special Order "Shift Differential," Section VIII 93-S-1, January, 1993	15
Missouri Code § 84.160(1)-(5)	17
U.S. Department of Labor Report and Recommendations of Regulations, 29 C.F.R. Part 541, "Stein Report" (October 10, 1940), pp. 2-10, "Weiss Report," (June 30, 1949), pp. 24-27, and "Kantor Report" (March 3, 1958), pp. 2-3	20
U.S. Department of Labor, Regulatory Notice, Defining and Delimiting 29 C.F.R. Part 541, 61 Fed. Register 23238 (May 13, 1996)	43
Deposition Excerpts:	
Christopher J. Day Deposition, September 1, 1989, pp. 6-7	47
Rosalie Cortelyou Deposition, Defendants' FRCP 30(b)(6) Designee on Compensation Administration, September 2, 1989, pp. 6-7, 14-18, 29-40	47
Chief of Police Robert Scheetz Deposition, FRCP 30(b)(6) Designee on Department, October 4, 1989, pp. 11-12, 29-34, 48	58
Sgt. Ray Burgdorf Deposition, October 4, 1989, p. 49	63

TABLE OF CONTENTS—Continued

	Page
Larry Pattison Deposition, FRCP 30(b)(6) Designee on FLSA Exemption, October 4, 1989, pp. 13-17	63
Trial Transcript:	
Volume I, September 15, 1993	
The Court, pp. 40-43	67
Kurt Delabar, pp. 90-92, 130-132, 138-139, 143-146	69
Volume II, September 16, 1993	
Lt. James Scego, pp. 141-142	76
Capt. Roy Joachimstaler, p. 182	77
Capt. Jack Titone, pp. 205-207	77
Lt. Antoinette Filla, pp. 230, 237-238	78
Volume III, September 17, 1993	
Lt. John Burke, pp. 32-33	81
Lt. Col. Raymond Lauer, p. 166	81
The Court, pp. 196-199	82
Volume IV, September 20, 1993	
Sgt. Dana Sanders, pp. 57, 59	85
Sgt. Michael Frederick, pp. 95-96	85
Volume V, September 21, 1993	
Sgt. Michael Guzy, pp. 65-66, 69-70, 87, 91	87
Sgt. Charles Metzner, pp. 130-133, 138-142	88
The Court, pp. 158-159, 168-169	93

The following opinions, decisions, judgments, and orders have been omitted in printing this joint appendix because they appear on the following pages in the appendices to the printed Petition for *Certiorari* and Brief in Opposition:

From Petitioner's Appendix to Petition for Writ of Certiorari:

APPENDIX A:	
United States Court of Appeals For The Eighth Circuit, Decision *AUER v. ROBBINS*, slip op. No. 94-3355/3534 (8th Cir. Sept. 8, 1995)	1a

TABLE OF CONTENTS—Continued

	Page
APPENDIX B:	
United States District Court Findings and Conclusions of Law Entered April 22, 1994	36a
APPENDIX C:	
United States District Court Order Entered April 22, 1994	64a
APPENDIX D:	
United States District Court Order and Entry of Final Judgment Entered August 26, 1994	67a
APPENDIX E:	
United States District Court Memorandum and Order Entered October 30, 1991	68a
APPENDIX F:	
29 U.S.C. § 213(a)(1)	75a
29 C.F.R. Part 541.1	76a
29 C.F.R. Part 541.2	78a
29 C.F.R. Part 541.118	80a
29 C.F.R. Part 541.5d	85a
56 Fed. Reg. 45824 (Sept. 6, 1991)	86a
56 Fed. Reg. 45828 (Sept. 6, 1991)	94a
APPENDIX G:	
Police Manual, Metropolitan Police Dept. Rule 7, Complaint and Disciplinary Procedures	102a
APPENDIX K:	
57 Fed. Reg. 3766 (August 1992)	184a
APPENDIX L:	
Appellants/Cross Appellees' Appendix to the Eighth Circuit, Testimony of Sergeant Michael Guzy, Trial Transcript at 68-69, Eighth Circuit App. at 314-315	217a
Brief of Appellees/Cross-Appellants to the Eighth Circuit at 9	219a

TABLE OF CONTENTS—Continued

Page

From Appendix to Respondents' Brief in Opposition:

United States District Court Order, December 1, 1995..App. 1-2

Rosalie Cortelyou Deposition, FRCP 30(b) (6) Designee on compensation administration, September 2, 1996, pp. 3-5, 41-42, 45 .....App. 3-10

RELEVANT DOCKET ENTRIES

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI EASTERN DIVISION

Case No. 88-2071-C-4

Date	Proceedings
10/25/88	Complaint
11/30/88	Answer
12/19/88	Amended Complaint (First)
12/29/88	Answer
09/25/89	Amended Answer
02/21/90	Order Bifurcating Litigation and Discovery
04/06/90	Defendants' Motion for Summary Judgment
05/21/90	Plaintiffs' Motion for Summary Judgment and Response to Defendants' Motion for Summary Judgment
06/15/90	Defendants' Response to Plaintiffs' Motion for Partial Summary Judgment
07/18/90	Reply Memorandum to Defendants' Opposition to Plaintiffs Motion for Partial Summary Judgment
10/30/91	Order and Memorandum Granting Summary Judgment as to Plaintiff Lieutenant Delgado, Denying Plaintiffs Partial Summary Judgment
04/19/93	Order and Memorandum on Amended Complaint and Allowing 29 U.S.C. 216(b) Consenters
04/30/93	Amended Complaint (Second)
05/12/93	Amended Answer (Second)
05/24/93	Consent Forms, 29 U.S.C. § 216(c)

Date	Proceedings
06/22/93	Consent Forms, 29 U.S.C. § 216(c)
09/15-9/21/93	Bench Trial
12/10/93	Post-Trial Hearing
02/17/94	Order Finding Moot Defendants' Motion to Compel and Motion to Quash
04/22/94	Findings of Fact and Conclusion of Law
08/26/94	Judgment
09/16/94	Notice of Appeal
06/25/96	Denial of Costs Without Prejudice

IN THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Case Nos. 94-3355 and 94-3534

Date	Proceedings
09/23/94	Appeal Docketed (94-3355)
09/08/95	Opinion Filed and Judgment Entered

IN THE UNITED STATES SUPREME COURT

Case No. 95-897

Date	Proceedings
12/07/95	Petition for Writ of Certiorari (95-897)
06/24/96	Order Granting *Certiorari*

IN THE UNITED STATES DISTRICT COURT EASTERN DISTRICT OF MISSOURI EASTERN DIVISION

Cause No. 88-2071-C-4

FRANCIS BERNARD AUER, *et al.*,
Plaintiffs,

vs.

ROBERT BAER, *et al.*,
Defendants.

PLAINTIFFS' ANSWERS TO DEFENDANTS' SECOND INTERROGATORIES TO PLAINTIFFS

Come now Plaintiffs Buehler, Long, Delgado, Corona, Pona, Milne, and Hall and file their answer to Defendants' Second Interrogatories to Plaintiffs.

* * * *

12. State whether Plaintiffs' claim that their biweekly salaries have been subject to deduction for absences occasioned by the St. Louis Metropolitan Police Department or by the operating requirements of the Department. If answered in the affirmative:

(a) State, in detail, the basis for such claim and identify any writings relied upon to support such claim; and

(b) Specify each and every instance in which such a deduction was made, giving the date(s), reasons for the deduction, number of hours involved, and the amount of the deduction.

ANSWER:

No. Plaintiffs salaries have not been subject to deductions for absences occasioned by the Department.

13. State whether Plaintiffs claim their biweekly salaries have been subject to deductions for absences from work of less than a day; i.e., a scheduled shift. If answered in the affirmative:

(a) State, in detail, the basis for such claim and identify any writings relied upon to support such claim; and

(b) If not included in the answer to subparagraph (a) above, state whether Plaintiffs' claim that requiring the use of sick leave, vacation time, furlough with pay, or previously banked overtime hours for absences from work of less than a day constitutes a deduction from their biweekly salaries even though the amount of their compensation is not affected; and

(c) Specify each and every instance in which a deduction was made for an absence from work of less than a day in circumstances other than where sick leave, vacation time, furlough with pay, or previously banked overtime hours were used to compensate for such absence, giving the date(s), reasons for the deduction, number of hours involved, and the amount of the deduction.

ANSWER:

Yes. Plaintiffs salaries have been subject to deduction.

(a) As per the Memo of Major John Walsh dated August 2, 1988 and Memo of Lt. Colonel Calzona Hall dated August 13, 1988. It is the policy of the Department to dock from plaintiffs overtime bank for any time missed from work for personal or other reasons. Said docking can be in increments of less than one day.

(b) Yes.

(c) To the best of plaintiffs' knowledge, they have not been docked for absences of less than a day. However, plaintiffs believe that their wages would be subject to such deduction if they were absent for less than a day and they were not excused by their superior.

14. State whether Plaintiffs have ever suffered a loss of pay in an amount less than the equivalent of a day's work as a result of a disciplinary suspension or any other disciplinary action. If answered in the affirmative, specify each and every instance of such an occurrence, giving the date(s), reasons for discipline imposed, the amount of pay lost, and the basis for calculation of said amount if known.

ANSWER:

No

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Cause No. 88-2071-C-4

FRANCIS BERNARD AUER, *et al.*,
Plaintiffs,

v.

ROBERT BAER, *et al.*,
Defendants.

REQUEST FOR ADMISSIONS

Come now Defendants, by their attorneys, pursuant to Rule 36, Federal Rules of Civil Procedure, and request Plaintiff James Gilbert Hall to make the following admissions, for purposes of the pending action only.

1. Parts III and IV of Exhibit A, attached hereto, accurately describe the primary function and specific duties and responsibilities regularly performed by Plaintiff as a Police Sergeant for the period from April 15, 1986 to the present.

2. Plaintiff has customarily and regularly directed and/or supervised the work of two (2) or more police officers, in his capacity as a Police Sergeant, for the period from April 15, 1986 to the present.

3. Plaintiff, in his capacity as a Police Sergeant, has been paid on an annual salary basis which equates to more than Two Hundred Fifty Dollars ($250.00) per week, for the period from April 15, 1986 to the present.

4. Plaintiff, in his capacity as a Police Sergeant, has customarily and regularly devoted more than half his time to the performance of nonmanual work for the period from April 15, 1986 to the present.

* * * *

RESPONSES TO REQUESTS FOR ADMISSIONS

[December 16, 1988]

Comes now plaintiff, Francis Bernard Auer, and for his response to Defendants' Request for Admissions states:

1. Deny.
2. Admit.
3. Admit.
4. Deny.

* * * *

RESPONSE TO REQUESTS FOR ADMISSIONS

[December 16, 1988]

Comes now plaintiff, James Gilbert Hall, and for his response to Defendants' Request for Admissions states:

1. Deny.
2. Admit.
3. Admit.
4. Deny.

* * * *

RESPONSE TO REQUEST FOR ADMISSIONS

[April 11, 1989]

Comes now Plaintiff Herman Ubben and for his response to Defendants' Request for Admissions states:

1. Deny.
2. Admit.
3. Admits being paid more than $250.00 per week; denies this is "salary" as defined by FLSA.

* * * *

RESPONSE TO REQUEST FOR ADMISSIONS

[April 11, 1989]

Comes now Plaintiff James E. Long and for his response to Defendants' Request for Admissions states:

1. Deny.
2. Admit.
3. Admits being paid more than $250.00 per week; denies this is "salary" as defined by FLSA.

* * * *

RESPONSE TO REQUEST FOR ADMISSIONS

[April 11, 1989]

Comes now Plaintiff Joseph D. Beffa and for his response to Defendants' Request for Admissions states:

1. Deny.
2. Admit.
3. Admits being paid more than $250.00 per week; denies this is "salary" as defined by FLSA.

* * * *

RESPONSE TO REQUEST FOR ADMISSIONS

[April 11, 1989]

Comes now Plaintiff Eugene Milne and for his response to Defendants' Request for Admissions states:

1. Deny.
2. Admit.
3. Admits being paid more than $250.00 per week; denies this is "salary" as defined by FLSA.

* * * *

RESPONSE TO REQUEST FOR ADMISSIONS

[April 11, 1989]

Comes now Plaintiff Richard Buehler and for his response to Defendants' Request for Admissions states:

1. Deny.
2. Admit.
3. Admits being paid more than $250.00 per week; denies this is "salary" as defined by FLSA.

* * * *

RESPONSE TO REQUEST FOR ADMISSIONS

[April 11, 1989]

Comes now Plaintiff Anthony Pona and for his response to Defendants' Request for Admissions states:

1. Deny.
2. Admit.
3. Admits being paid more than $250.00 per week; denies this is "salary" as defined by FLSA.

* * * *

RESPONSE TO REQUEST FOR ADMISSIONS

[April 11, 1989]

Comes now Plaintiff Michael A. Indelicato and for his response to Defendants' Request for Admissions states:

1. Deny.
2. Admit.
3. Admits being paid more than $250.00 per week; denies this is "salary" as defined by FLSA.

* * * *

RESPONSE TO REQUEST FOR ADMISSIONS

[April 11, 1989]

Comes now Plaintiff George McDonagh and for his response to Defendants' Request for Admissions states:

1. Deny.
2. Admit.
3. Admits being paid more than $250.00 per week; denies this is "salary" as defined by FLSA.

* * * *

RESPONSE TO REQUEST FOR ADMISSIONS

[April 11, 1989]

Comes now Plaintiff Francis B. Corona and for his response to Defendants' Request for Admissions states:

1. Deny.
2. Admit.
3. Admits being paid more than $250.00 per week; denies this is "salary" as defined by FLSA.

* * * *

RESPONSE TO REQUEST FOR ADMISSIONS

[April 11, 1989]

Comes now Plaintiff Roy Burgdorf and for his response to Defendants' Request for Admissions states:

1. Deny.
2. Admit.
3. Admits being paid more than $250.00 per week; denies this is "salary" as defined by FLSA.

* * * *

RESPONSE TO REQUEST FOR ADMISSIONS

[April 11, 1989]

Comes now Plaintiff Manuel M. Delgado, and for his response to Defendants' Request for Admission states:

1. Deny.
2. Admit.
3. Admits being paid more than $250.00 per week; denies this is "salary" as defined by FLSA.
4. Deny.

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Cause No. 88-2071-C-4

FRANCIS BERNARD AUER, *et al.*,
Plaintiffs,
v.
JAMES O'FLYNN, *et al.*,
Defendants.

STATEMENT OF FACTS NOT IN DISPUTE

* * * *

8. Plaintiffs' compensation is converted into an hourly equivalent. It is the policy of the Police Department to dock from officers' "overtime banks" in hourly increments for time missed for personal or other reasons. The "overtime banks" are compensatory time banks which sergeants carried over when they were promoted. *See* Plaintiffs' Answers to Defendants' Second Interrogatories #13; Cortelyou Dep. at 13, Burgdoff Dep. at 49. Plaintiffs' "rec. time" banks are kept in hours, not days. Cortelyou Dep. at 17. Plaintiffs who work night shifts are paid a shift differential for the period between 11:00 p.m. and 7:00 a.m. This differential is measured in hour increments. Some plaintiffs receive or have received this shift differential. *See, e.g.,* Auer Dep. at 7; Day Dep. at 5-6. Sergeants can lose pay, vacation time or sick leave in hour increments for missing part of a day. *See* Facts 9-10 below. Sick time is calculated in hour increments. Cortelyou Dep. at 18.

9. Plaintiffs' compensation is and has been subject to deduction for absences of work of less than one day. *See, e.g.,* Scheetz Dep. at 31-33 and Police Department Rule 7.004(c)(1) (lose pay as AWOL); August 2, 1988

Memo from Major John Walsh (Attachment 1); and August 23, 1988 Memo from Lt. Colonel Calonzona Hall (Attachment 2) (loss of accrued sick or vacation time); *see also* Pattison Dep. at 13 (loss of pay for missing part of a day when disciplined); Plaintiffs' Answers to Defendants' Second Interrogatories to Plaintiffs #13.

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Case No. 88-2071-C-4

FRANCIS BERNARD AUER, *et al.*,
Plaintiffs,

v.

DAVID A. ROBBINS, *et al.*,
Defendants.

JOINT STIPULATION OF UNCONTESTED FACTS

* * * *

2. The individuals who, in their official capacities, comprise the present Board of Police Commissioners are: James Conway, Charles Mischeaux, Matthew Padberg, Anne-Marie Clarke, Freeman Bosley, *ex-officio*. These individuals, as comprising the Board of Police Commissioners, are the true Defendant(s) in this action. The Board of Police Commissioners (Board) is an entity organized and authorized pursuant to Section 84.020, R.S.Mo., and is the statutorily-created state agency responsible for governing the St. Louis Metropolitan Police Department. The Board is the employer of plaintiffs within the meaning of the FLSA, 29 U.S.C. Section 203 (d). The individuals defendants are sued herein in their official capacities.

* * * *

10. Each of the plaintiffs, at all times pertinent hereto, while holding the rank of sergeant, received at least Two Hundred Fifty Dollars ($250.00) per week.

11. Defendants' Exhibit C accurately reflects the base annual compensation paid to the officers of the Police

Department by rank for the periods indicated. Annual compensation amounts for all officers, including the Chief of Police, are set by the Missouri State Legislature. It does not reflect, in all cases, total compensation received by the officers.

[Signature Block Omitted]

METROPOLITAN POLICE DEPARTMENT
CITY OF SAINT LOUIS
OFFICE OF THE CHIEF OF POLICE
SPECIAL ORDER

Section VIII

Date Issued: January 6, 1993 Order No.: 93-S-1

Effective Date: January 11, 1993 Expiration: Indefinite

Reference: _____

Cancelled Publications: _____

Subject: SHIFT DIFFERENTIAL COMPENSATION—COMMISSIONED OFFICERS

TO: ALL BUREAUS, DISTRICTS AND DIVISIONS

A. *APPLICABILITY*

All commissioned officers will receive shift differential pay on the basis of any whole hours worked between 11:00 P.M. and 7:00 A.M. at the rate of ten percent of the officer's base hourly pay.

B. *PROCEDURES*

1. *Regular Shift Differential*

Shift differential is reported in whole hour units only beginning at 11:00 P.M. and ending at 7:00 A.M., for a maximum of 8 hours per 24 hour period. Shift differential pay will not be granted for any period of time worked which is less than a whole hour. Shift differential on a scheduled watch is indicated in the attendance column of the Duty Roster Worksheet.

2. *Shift Differential in Conjunction with Overtime—Police Officer Rank and Below*

a. Shift differential in conjunction with overtime worked between 11:00 P.M. and 7:00

A.M. will also be computed in terms of whole hours only. Shift differential pay will not be granted for any period of overtime worked which is less than a whole hour.

b. Shift differential earned as a result of overtime will be recorded in section 4 of the "Compensation Form", GEN-162, which will be prepared in duplicate.

Example: Officer *assigned to 2:50 P.M. to* 10:50 P.M. shift works overtime until 1:00 A.M.—two (2) hours of shift differential have been earned.

c. Shift differential hours earned in conjunction with overtime will be entered into the computerized duty roster system by the Budget and Finance Division. The original copy of the overtime form will be forwarded with the Duty Roster Worksheet within 24 hours. The duplicate copy will be filed in the unit.

3. *Shift Differential When Sergeants and Above Work Beyond Their Regular Tour of Duty*

a. Shift differential earned when a sergeant or above works beyond his regular tour of duty, between 11:00 P.M. and 7:00 A.M., will be computed in terms of whole hours only. Shift differential pay will not be granted for any period of time worked which is less than a whole hour.

b. The shift differential earned as a result of working beyond the regular tour of duty will be recorded in section 4 of the "Compensation Form", GEN-162, which will be prepared in duplicate and forwarded as specified above.

84.160. Annual salary tables—overtime, how compensated—other employment benefits—unused vacation, compensation for certain officers

1. Based upon rank and length of service, the board of police commissioners may authorize maximum amounts of compensation for members of the police force in accordance with the following tables.

* * * *

2. From July 1, 1991:

Salary Matrix—Turnkey Through Chief of Police—Fiscal Year 1991/1992 (5%)

Yrs.	P.O. Salary	Sgt. Salary	Lieut. Salary	Capt. Salary	Maj. Salary	Lt. Col. Salary	Chief Salary
0	24600						
1	26322						
2	27552						
3	29028						
4	30135						
5	31119	38276					
6	32226	38487					
7	32472	38698	43868				
8	32693	38909	44079				
9	32915	39120	44290	49010			
10	33136	39331	44501	49221			
11	33358	39542	44712	49432	53732		
12	33579	39753	44923	49643	53943	57984	67158
13	33800	39964	45134	49854	54154	58195	67601
14	34022	40175	45345	50065	54365	58406	68044
15	34243	40386	45556	50276	54576	58617	68486
16	34465	40597	45767	50487	54787	58828	68929
17	34686	40808	45978	50698	54998	59039	69372
18	34907	41019	46189	50909	55209	59250	68915
19	35129	41230	46400	51120	55420	59461	70258
20	35350	41441	46611	51331	55631	59672	70700
21	35572	41652	46822	51542	55842	59883	71143
22	35793	41863	47033	51753	56053	60094	71586
23	36014	42074	47244	51964	56264	60305	72029
24	36236	42285	47455	52175	56475	60516	72472
25	36457	42496	47666	52386	56686	60727	72914
26	36679	42707	47877	52597	56897	60938	73357
27	36900	42918	48088	52808	57108	61149	73600
28	37121	43129	48299	53019	57319	61360	74243
29	37343	43340	48510	53230	57530	61571	74686
30	37564	43551	48721	53441	57741	61782	75128

From July 1, 1991, each turnkey beginning his first year or who has served more than one year as a turnkey may receive twenty-two thousand three hundred forty-six dollars per annum; each turnkey who has served more than five years as a turnkey may receive twenty-four thousand four hundred sixty-three dollars and eighty-one cents per annum; and each turnkey who has served more than nine years as a turnkey may receive twenty-five thousand four hundred forty-nine dollars and twelve cents per annum.

3. Each of the above-mentioned salaries shall be payable in biweekly installments. Each officer of police and patrolman whose regular assignment requires nonuniformed attire may receive, in addition to his salary, an allowance not to exceed three hundred sixty dollars per annum payable biweekly. No additional compensation or compensatory time off for overtime, court time, or standby court time shall be paid or allowed to any officer of the rank of sergeant or above.

4. It is the duty of the municipal assembly or common council of the cities to make the necessary appropriation for the expenses of the maintenance of the police force in the manner herein and hereafter provided; provided, that in no event shall such municipal assembly or common council be required to appropriate for such purposes (including but not limited to costs of funding pensions or retirement plans) for any fiscal year a sum in excess of any limitation imposed by article X, section 21, Missouri Constitution; and provided further, that such municipal assembly or common council may appropriate a sum in excess of such limitation for any fiscal year by an appropriations ordinance enacted in conformity with the provisions of the charter of such cities.

5. The board of police commissioners shall pay additional compensation for all hours of service rendered by turnkeys, probationary patrolmen and patrolmen in excess of the established regular working period, and the rate of compensation shall be one and one-half times the regular

hourly rate of pay to which each member shall normally be entitled; except that, the court time and court standby time shall be paid at the regular hourly rate of pay to which each member shall normally be entitled. No credit shall be given or deductions made from payments for overtime for the purpose of retirement benefits.

* * * *

REPORT AND RECOMMENDATIONS OF THE PRESIDING OFFICER AT PUBLIC HEARINGS ON PROPOSED REVISIONS OF REGULATIONS, PART 541

Defining the Terms

"Executive" "Administrative"

"Professional"

"Local Retailing Capacity"

"Outside Salesman"

as contained in Section 13(a)(1) of the Fair Labor Standards Act

I. "Stein Report", October 10, 1940
(Harold Stein, Presiding Officer)

II. "Weiss Report", June 30, 1949
(Harry Weiss, Presiding Officer)

III. "Kantor Report", March 3, 1958
(Harry S. Kantor, Presiding Officer)

UNITED STATES DEPARTMENT OF LABOR
W. WILLARD WIRTZ, Secretary

U.S. Wage and Hour and Public Contracts Divisions
CLARENCE T. LUNDQUIST, Administrator
Washington, D.C.

"Stein Report"

October 10, 1940

* * * *

Section II. THE ADMINISTRATOR'S AUTHORITY UNDER SECTION 13(a)(1) OF THE ACT

ADMINISTRATOR HAS BROAD POWERS

It was freely admitted by interested parties that the Administrator is given a large degree of discretion under section 13(a)(1) of the Fair Labor Standards Act.[5] It is clear from the very terms of the act itself that Congress felt that the mere use of the phrase "employed in a bona fide executive capactiy" etc. was adequate as a standard, but inadequate as a detailed rule to guide employers, employees, and the courts. It therefore gave the Administrator the responsibility of amplifying and describing more precisely the type of employees to whom the exemption would be applicable. Use by Congress of the word "delimited" as well as the word "defined" is a further indication of the extent of the Administrator's discretionary power under this section of the act. Therefore, the Administrator is responsible not only for determining which employees are entitled to the exemption, but also for drawing the line beyond which the exemption is not applicable.

EXEMPTION SHOULD BE INTERPRETED NARROWLY

The general rule in a statute of this nature, that coverage should be broadly interpreted and exemptions narrowly interpreted, is so well known as to need little elaboration here. This doctrine was recently restated by the Circuit Court of Appeals for the Eighth Circuit in its

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[5] See, for example, statements of Elisha Hanson, American Newspaper Publishers Association, and Morris Zeitlin, International Federation of Architects, Engineers, Chemists, and Technicians. Hearing July 25-9 vol. II, p. 317 and vol 1, p. 149, respectively.

opinion in the Hawkeye case,[6] in conection with the exemption in section 13(a)(5) of the act. In this opinion, which is equally applicable to the problems of definition and delimitation under section 13(a)(1), the court said:

> The manifest declared purpose of the statute was to eradicate from interstate commerce the evils attendant upon lower wages and long hours of service in industry. Accepting this as the declared purpose of the act, exemption would tend to defeat its purpose. The statute is remedial, with a humanitarian end in view. It is, therefore, entitled to a liberal construction.

Later the opinion quotes the following from *United States* v. *Dickson:*[7]

> In short, a proviso carves special exceptions only out of the enacting clause; and those who set up any such exception must establish it as being within the words as well as within the reason thereof.

The *Hawkeye* opinion continues:

> This rule of construction is applicable even though the statute contains certain penal provisions. Here no penalties are sought to be enforced but remedies. In such circumstances, exemptions should be construed strictly.

CHANGES ARE RECOMMENDED

Certain modifications of the present definitions are recommended in this report. These recommendations should in no way be construed, however, as an admission that the present definitions are either improper or beyond the scope of the Administrator's statutory authority. They

[6] *Fleming* v. *Hawkeye Pearl Button Co.*, 113 F. (2d) (adv. ops.) 52 (C. C. A. 8th, 1940).

[7] 40 U.S. 141 (1841).

should be construed, rather, as evidence that improvements can be made in the light of actual experience. The investigation shows not only that the present definitions are not perfect,[8] but also that no definition can ever be expected to be perfect. And it also shows that the Administrator's discretionary powers are broad enough to cover various possible definitions, all of which would be well within his legal rights. This was conceded by many witnesses.[9]

CHANGES CANNOT BE RETROACTIVE

This point is of some consequence, since it means that any substantive change in the regulations can affect only the future status of the employees concerned. The amendments do not and cannot in any way affect the responsibility of employers toward their employees from October 24, 1938, until the date of the amendment of the regulations. Both the present and the proposed regulations are, it is believed, entirely legal. Both are in full accord with the general policy of Congress as expressed in the preamble of the act and both give practical effect to the specific statutory exemption created by Congress in section 13(a)(1). Certain substantive changes are recommended, partly to describe the properly exempt groups of employees more precisely and partly to make the extent of the exemptions more easily understandable. This will aid in the effective enforcement of the act.

Section III. EXECUTIVE AND ADMINISTRATIVE

JOINT DEFINITION CRITICISED

Of the numerous criticisms made of the present regulations there is perhaps none so frequently repeated as that

[8] Reports were requested and obtained from all the regional offices of the division on the experiences of inspectors in applying the definitions to actual cases.

[9] Statements of Elisha Hanson and Morris Zeitlin, op. cit., note 5.

the Administrator erred in not making separate definitions of the two words "executive" and "administrative." In some instances it was merely suggested that there would be certain desirable practical results obtained by separating the terms.[10] In other instances the Administrator was charged with failure to carry out his statutory responsibility by not making separate definitions.[11] The validity of this contention is doubtful, since "executive" and "administrative" are used synonymously in common speech and in court decisions.[12] Furthermore, this contention was usually coupled with a proposal so drafted that any employee who could qualify under the "executive" definition would also invariably qualify under the "administrative" definition.[13] In other words, the definition of the term "administrative" was made so broad as to surround and completely engulf the term "executive."

Clearly the Administrator would not fulfill an alleged responsibility to define the terms separately by promulgating two different sets of words one of which renders the other superfluous. If the present investigation resulted in the conclusion that an appropriate definition of the term "administrative" must be so broad as to deny independent value to the definition of the term "executive," it would

[10] Statement of Alexander Konkle, Machinery and Allied Products Institute, record of June 3 and 5 hearing, vol. II, p. 252.

[11] Statement of Clarel B. Mapas, Mid-Continent Oil & Gas Association; record of June 3 and 5 hearing, vol. II, p. 142; Statement of Homer Mitchell, Motion Picture Producers and Distributors of America, record of July 25-29, hearing, vol. I, p. 37.

[12] See, e.g., Words and Phrases, vol. I, p. 198; second series, vol. 2, p. 383; third series, vol. I, p. 277; *Reint v. Allen*, 169 La. 1046, 126 So. 548 (1930); *Nissen v. City of Winston Salem*, 206 N. C. 888, 175 S. E. 310 (1934); *In re Heafy*, 285 N. Y. S. 180, 247 App. Div. 277 (1936), affirmed *Heafy v. McCabe*, 1 N. E. (2nd) 357, 270 N. Y. 616 (1936).

[13] For example, see proposed redefinitions submitted by Wholesale Dry Goods Institute, Inc., Montgomery Ward & Co., National Lumber Manufacturers Association, and American Bankers Association.

be wise to draft a single definition, as at present. However, careful analysis shows that this is not a necessary or even the best conclusion.

The present definition of the terms "executive" and "administrative" applies with particular aptness to persons who are commonly called "bosses." The range of exemption is broad. It extends from the president of a large and complex corporate structure down to the foreman in charge of a very minor department. Although certain minor modifications are proposed below, the present definition does describe and exempt the person who possesses and wields specific executive authority. However, the investigation also shows that in modern business there has been an increasing use of persons whose authority is functional rather than departmental. Primarily they determine or affect policy or carry out major assignments rather than give orders to individuals.[14] Many of these persons have mixed responsibilities and succeed in qualifying under the present definition, but there is a large group who either do not qualify or whose qualifications are dubious.

SEPARATE DEFINITIONS ADVISABLE

The investigation justifies the conclusion that a reasonable interpretation of section 13(a)(1) can include exemption for certain employees with miscellaneous policy-making or policy-executing responsibilities. This exemption can be made effective most easily by drafting separate definitions of the terms "executive" and "administrative." While the usage of the two terms is so vague and so overlapping that there is no generally recognized and precise line of demarcation between them, it does no violence to the common understanding of the words to apply "executive" to the person who is a boss over men and to apply

[14] Examples of this type of employee are executive assistants, traveling inventory men, purchasing agents, tax experts, and safety directors.

"administrative" to the person who establishes or affects or carries out policy but who has little or no authority over the specific actions of other individuals. Doubtless the present single definition could be so amplified as to include this latter group within its scope, but the regulations will be more easily understood and administered if a separate definition and delimitation is adopted for the term "administrative." [15]

Section IV. SALARY TESTS

SALARY TESTS FOR THE VARIOUS TYPES OF EMPLOYMENT

With few exceptions, there was general agreement on the appropriateness of a salary test for the terms "executive" and "administrative." [16] It was widely conceded that the terminology of section 13(a)(1) implies a status which cannot be attained by those whose pay is close to or below the universal minimum envisaged in the act. It

[15] Compare the distinction between "administration," "management," and "operation" in the article entitled "Administration and Organization, Functions of" in Pitman's Dictionary of Industrial Administration, vol. I, p. 10. "Administration" is explained as the policy-making function, "management" as the policy-executing function.

[16] A salary qualification was included in proposed redefinitions submitted by the following: Shell Oil Co., Mid-Continent Oil & Gas Association, National Wholesale Druggists' Association, Council of National Wholesale Associations, Indiana Manufacturers' Association, United Wholesale Grocers Association Inc., American Retail Federation, Manufacturers' Association of Connecticut Inc., National Association of Manufacturers, National Association of Ornamental Metal Manufacturers, Oklahoma Stripper Well Association, Insulation Board Institute, Motion Picture Producers and Distributors of America, National Small Business Men's Association, American Newspaper Publishers' Association, Edison Electric Institute, National Association of Broadcasters, and International Brotherhood of Electrical Workers. The alternative redefinitions of "executive" and "administrative" submitted by the American Bankers Association were based entirely on a salary qualification.

was further pointed out that the good faith specifically required by the act is best shown by the salary paid. A more detailed examination of these matters will be found below in sections VI and VII of this report.

The propriety of a salary test for professional employees was not given such full consideration at the hearings but insofar as the question was raised, there was considerable agreement on its appropriateness; this is discussed in section VIII. On the other hand, it was apparently universally assumed that there would be no salary test in the definition of "outside salesman"; this opinion is commented on in section IX.

The amounts proposed for the various definitions varied from nothing to $5,000. Further, a considerable number of definitions suggested different salary tests for the different terms, and this is recommended below. However, it was notable that only one of the proposals included differentials based on regional or population differences. This proposal, which has not been adopted in the recommendations, requires analysis.

REGIONAL AND POPULATION SALARY DIFFERENTIALS

It was proposed by the American Bankers Association and various other parties that various salary minima be established. Generally speaking, these proposals suggested different minima for different sized communities.[17] Other proposals suggested either varying minima or a single minimum specifically designed to take into account some local customary salary base. Furthermore, some parties claimed that the Administrator did not have authority and should not establish a general national minimum require-

[17] The American Bankers' Association's alternative redefinition for "administrative" provided for six different salary qualifications varying from $80 a month for those employed in towns having a population of less than 10,000 to $200 a month for those employed in cities having a population of 1,000,000 or more.

ment for exemption.[18] Aside from the serious difficulties in enforcement that would be involved, these various suggestions fail to take into account the fact that the Fair Labor Standards Act itself has as an objective "a universal minimum wage of 40 cents an hour" and contemplates lower differential minima only as a temporary device in reaching the universal minimum as rapidly as possible.

Further, it should be recognized and admitted that the minimum salary qualification in the definitions of "executive," "administrative," and "professional" must be in each instance an approximation of what will best effectuate the purposes of the act. Like most laws of national application, the act itself and the regulations issued thereunder cannot pretend to be scientific in the sense of taking into account every small variation occurring over the length and breadth of the country. To make enforcement possible and to provide for equity in competition, a rate should be selected in each of the three definitions which will be reasonable in the light of average conditions for industry as a whole. In some instances the rate selected will inevitably deny exemption to a few employees who might not unreasonably be exempted, but, conversely, in other instances it will undoubtedly permit the exemption of some persons who should properly be entitled to the benefits of the act.

Section V. THE EXEMPTION OF ALL WHITE-COLLAR WORKERS

LEGAL ARGUMENTS

Some of the proposals, most notably perhaps the proposal of the Southern States Industrial Council (as originally presented in written form)[19] would have the effect of exempting all of that very large group of persons known loosely as "white collar workers"—generally speaking, all employees except laborers, machine operators and tenders, craftsmen, and maintenance workers. It is unnecessary herein to discuss in detail the various legal arguments that were advanced in support of the proposition that such workers are not covered by the act at all. The Administrator has on numerous occasions expressed the opinion that white collar workers as such are entitled to the benefits of the act[20] and his opinion is, of course, followed in this report. Under the contrary opinion the specific statutory exemptions for named groups of typical white collar employees would not be needed nor would there be any occasion for a reexamination of Regulations, Part 541. However, it was urged alternatively by some that, while the general coverage of the statute might be thought to include "white collar" workers, the terms "executive," "administrative," and "professional" (and presumably "outside salesman") in and of themselves should be construed and were meant by Congress to exclude from the benefits of the act all white collar workers. Surely if Congress had meant to exempt all white collar workers, it would have adopted far more general terms than those actually found in section 13(a)(1) of the act. The theory of general exemption is further negated by the grant of power to the Administrator to define and delimit those terms.

OVERTIME AND "IN-SERVICE" TRAINING

In addition to the legal arguments advanced, it was stated as a reason for exempting "white collar" workers that the overtime penalty interferes with the efforts of

[18] It was argued by Mary M. Manderscheld, Montgomery Ward & Co., that this involves the assumption by the Administrator of a power to fix minimum wages for "executive" and "administrative" employees for which no basis is found in the act. Record April 10-16 hearing, vol. II, p. 267.

[19] It was later stated at the hearing by the Council's general counsel, J. H. Ballew, that a salary qualification of $20 to $30 a week would not be objectionable; record June 3-5 hearing, vol. I, p. 27.

[20] See Wage and Hour Division Interpretative Bulletin No. 1, par. 5.

ambitious young men to improve their status by studying their employer's business after working hours.[21] An employer may frequently consider such after-hours work of inadequate educational value to justify overtime payments. However, the normal practice throughout industry for both factory and clerical workers is to give training on the job and during working hours, and the act in no way discourages such training. While a hardship with respect to training may be produced in occasional exceptional instances, this hardship must be weighed against the general widespread improvement of working conditions which results from application of the act.

It was also stated that the overtime requirements force some employers to place their clerical employees on staggered shifts which are inconvenient to both employer and employee.[22] No doubt this has occurred in some instances, although much of the testimony on this point referred to staggered shifts as a future possibility rather than a present actuality. These inconvenient staggered shifts may or may not be put into effect and at most will be adopted by only a small percentage of employers. Again such inconvenience as may result must be balanced against widespread shortening of working hours and increased employment.[23]

Another general argument advanced to support proposals that all clerical workers be exempted is that compliance with the act may lead employers to change many of their employees from a weekly or monthly salary to a

[21] For example, see statement of A. L. M. Wiggins, American Bankers' Association, record July 9 and 10 hearing, vol. I, p. 26.

[22] For example, see statement of F. G. Addison, Securities Savings and Commercial Bank of Washington, D. C., record July 9 and 10 hearing, vol. I, p. 54.

[23] One large New York bank hired 300 additional employees to reduce hours below the statutory maximum; see address of Administrator before the Iowa Bankers' Association, Des Moines, Iowa, Sept. 11, 1940; Wage and Hour Division, G-79, p. 4.

straight hourly pay basis with the result that the employees will earn less in slack times.[24] Without underestimating the general desirability of weekly or monthly salaries which enable employees to adjust their expenditures on the basis of an assured income (so long as they remain employed), there is little advantage in salaried employment if it serves merely as a cloak for long hours of work. Further, such salaried employment may well conceal excessively low hourly rates of pay.[25] It also does not appear why there should be a reluctance to make occasional or even frequent overtime payments to salaried workers (other than those who fall into the narrower group of specifically exempted employees). Either the penalty payments will discourage long hours of work, or the worker will receive a reasonable compensation for his additional efforts. Extra payments by way of bonuses have long been common and are not considered inconsistent with salaried status. Although it is not suggested that under all circumstances the requirement of overtime payments to salaried workers is completely desirable and completely equitable, it is believed that under normal conditions the requirement is appropriate for salaried as well as for hourly paid workers. Finally, while it is reasonable to hold that the terms "bona fide executive, administrative * * * and professional capacity" are properly applicable in general only to salaried workers,[26] it does not necessarily follow that all salaried workers fall within these three categories. Even if such action were desirable, and

[24] See statement of A. L. M. Wiggins, op. cit., note 21, p. 10.

[25] It was stated by Hugh C. McKenny, Commercial Telegraphers' Union, that, as a result of the exemption from overtime payments accorded executives, employees in nonexecutive positions working the same number of hours and being paid at a lower rate will frequently surpass the executive in total compensation received. Record July 25-29 hearing, vol. IV, p. 546.

[26] As will be seen below, a requirement that pay be on a salary basis is recommended for executive employees and on a salary or fee basis for administrative and professional employees.

it is not thought to be so, the Administrator does not have the power to exempt all salaried workers.

Another argument frequently advanced by the proponents of a blanket exemption for white collar workers is that the maximum hours provisions of the act are or should be applicable only to persons whose earnings approximate the minimum wage. "A ceiling for hours" is just as much an independent objective of the act as a "floor for wages," and surely it is a serious misreading of the act to assume that Congress meant to discourage long hours of work only where the wages paid were close to the statutory minimum. Living conditions can be improved and work spread even where wages are comparatively high.

LOW WAGES OF SALARIED WORKERS

All the foregoing arguments have as an inarticulate major premise the assumption that all salaried white collar workers enjoy satisfactory working conditions—that they need no protection against oppressively long hours. The record shows the incorrectness of this assumption. There is evidence, some of it introduced by proponents of the blanket exemption, that, prior to the effective date of the act, a workweek of 48 or 54 hours or even longer was common.[27] This is confirmed by the results of a survey of 4,821 women office employees in 39 States and the District of Columbia which was quoted by one witness to show that the hours of work of these employees are frequently long, 30 percent of them having a workweek of 44 to 48 hours and 10 percent having one of 48 hours or more.[28] The significance of this testimony is enhanced

[27] See, for example, statement of Joseph T. Owens, representing the Pittsburgh Plate Glass Co., record April 10-16 hearing, vol. II, p. 243; statement of Lewis Merrill, United Office and Professional Workers of America, record April 10-16 hearing, vol. II, p. 342.

[28] Women's Bureau, U.S. Department of Labor, Bulletin No. 132, Women Who Work in Offices. Quoted by Nina P. Collier, League of Women Shoppers, Inc., record April 10-16 hearing, vol. V, p. 786.

by the fact that the 1930 Census of Population showed that 1,986,830 or 49.4 percent of the total number of clerical workers were women. Moreover, there was testimony that vacations with pay are far from universal[29] and that long hours at sedentary occupations are not conducive to health.[30] Thus, the labor conditions of this group of employees have frequently been, in fact, "detrimental to health, efficiency, and general well-being." This conclusion is corroborated by the testimony of union representatives who furnished evidence of the enhanced well-being of their members caused by the shortening of their working hours. Concretely, for example, one union representative stated that the reduction of weekly hours of work had been followed by a notable decline in per capita sick benefits.[31]

The desire to have all white-collar workers exempted under section 13(a)(1) is probably also linked with a forgetfulness of the fact that section 13(a) exempts workers from both section 6 and section 7 and an unawareness of the low wages that an astonishingly large percentage of these workers have been paid. It was admitted by some employer representatives that occasionally white-collar workers receive low wages,[32] but the prevalence of low wages is best shown by surveys made by governmental agencies, State and Federal. The survey of women office

[29] Statement of Morris Zeltlin, International Federation of Architects, Engineers, Chemists, and Technicians, record July 25-29 hearing, vol. I, p. 156.

[30] Statement of Louis Merrill, United Office and Professional Workers of America, record April 10-16 hearing, vol. II, p. 340.

[31] Statement of Leo Bernstein, United Wholesale and Warehouse Employees of New York, record April 10-16 hearing, vol. V, p. 810.

[32] For example, are statement of J. H. Ballew, Southern States Industrial Council, record July 25-26 hearing, vol. I, p. 20, and statements of individual employers requesting exemption for white-collar employees with salaries ranging as low as $12 and $15 a week and $52, $55, and $57.50 a month, in Southern States Industrial Council Exhibit No. 4 (hearings branch Docket No. 55).

workers previously referred to showed that 25.4 percent of the employees covered earned less than $20.00 a week,[33] while another survey which covered both men and women office employees showed surprisingly large percentages earning less than $17.50 per week.[34]

In addition to the many statements made at the hearings by both employee and employer representatives concerning the attitude of white-collar workers toward their inclusion under the act, consideration must also be given to direct expressions from those immediately and personally affected by the proposed exemption. The Administrator has received a number of such letters. Typical among them is one from a white collar employee in North Carolina [35] who states that:

Federal labor legislation has been responsible for reducing our hours * * * from 70 and 80 a week to around

[33] Women's Bureau, op. cit., note 28.

[34] A census of office employees conducted in Pennsylvania in 1934 showed the percentage of workers in various white-collar occupations who earned less than $17.50 a week to be as follows:

	Percent
Office machine operators	52.4
Telephone and switchboard operators	68.4
File clerks	46.4
Order clerks	59.8
Office clerks	38.7
Shipping and receiving clerks	40.8
Stock clerks	47.4
Secretaries	23.3
Stenographers	51.9
Typists	62.1
Bank tellers	5.4
Bockkeepers	41.3

Pennsylvania Emergency Relief Administration, Census of Employable Workers in Urban and Rural Non Farm Areas, Pennsylvania, pp. 64 to 68.

[35] Letter dated August 25, 1940, from B. S. Dekle, found in hearings branch Docket No. 73.

42 * * * We and countless thousands of other so-called white-collar workers owe our leisure to the Wage-Hour Act. May I urge you again not to weaken it.

It is notable that although this employee obviously receives more than 40 cents an hour, he is deeply concerned with hours limitation. This is merely one individual statement out of many. The basic position is the same as that adopted by labor unions testifying on behalf of thousands of employees. To exempt these employees under section 13(a)(1) would deprive them of their right to the minimum wage required under section 6 and the overtime payments required by section 7. Their need for both should not be overlooked.

* * * *

"Weiss Report"

June 30, 1940

* * * *

"On a Salary * * * Basis"

The notice of hearing invited evidence on the need for revision or definition of the term "on a salary * * * basis." In response to this notice, a number of proposals relating to the "salary basis" requirements in the regulations were made in the course of the hearing. One of these was that the requirement of payment "on a salary * * * basis" be eliminated and that "average compensation" be used instead;[90] another, that employees be permitted to qualify for exemption even if paid an hourly wage.[91] Some witnesses suggested that the term "salary basis" be defined to mean payment of a fixed or guaranteed sum.[92] The evidence at the hearing showed clearly that bona fide executive, administrative, and professional employees are almost universally paid on a salary or fee basis. Compensation on a salary basis appears to have been almost universally recognized as the only method of payment consistent with the status implied by the term "bona fide" executive.[93] Similarly, payment on a salary (or fee) basis is one of the recognized attributes of administrative and professional employment. The proposals to eliminate the requirement and to apply an hourly rate or average earnings test may therefore be rejected as inconsistent with true executive, administrative or professional status.

[90] National Association of Motor Bus Operators, transcript, p. 1792.

[91] Lennox Furnace Co., S. L. No. 9.

[92] Office Employees International Union, AFL, transcript, p. 2734; National Coal Association, transcript, p. 1473; and Central Pennsylvanie Coal Producers' Association, transcript, p. 1581.

[93] See, for example, transcript, pp. 99-100, 134-135, 399, 707, 771-772, 999-1000, 1431-1432. The argument was also made, however, that the requirement of payment on a salary basis is illegal. See Exhibit No. 15.

A number of questions have arisen in the past in connection with the interpretation of the phrase "on a salary * * * basis" particularly with respect to the effect of deductions on the salaried status of an employee. The problem became of some importance during the war when the practice of making such deductions was adopted by some companies engaged in war production as a disciplinary measure to discourage absenteeism among executive and administrative employees.[94] This practice raised serious questions as to whether any employees to whom it was applied were actually employed "on a salary * * * basis" in accordance with the provisions of the regulations. Investigation by the Divisions indicated that this changed practice had become sufficiently widespread to warrant the conclusion that the wartime industrial practice differed from the pre-war practice and that such disciplinary deductions were no longer inconsistent with payment "on a salary * * * basis." In an effort to meet the wartime problems and to clarify the meaning of the term "on a salary * * * basis" the Divisions issued a restatement of position, the pertinent portion of which follows:

> An employee will be considered to be paid on a "salary basis" within the meaning of sections 541.1, 541.2, or 541.3 of Regulations, Part 541, if under his employment agreement he regularly receives each pay period, on a weekly, biweekly, semimonthly, monthly, or annual basis, a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the number of hours worked or in the quantity or quality of the work performed during the pay period. However, the fact that less than this amount is paid for a particular pay period because disciplinary deduc-

[94] Transcript, pp. 23, 1253-1254.

> tions are made for unreasonable absences would not in itself prove that the employee is not employed on a salary basis. On the other hand, since it is well recognized that bona fide executive, administrative, and professional employees are normally allowed some latitude with respect to the time spent at work, an employee will not be regarded as being paid on a salary basis if deductions are made for those types of absences ordinarily allowed such employees. For example, an employee is not being paid on a salary basis, if the employer makes deductions from his salary for an afternoon when he goes home early or when he occasionally takes a day off, unless, under the circumstances of a particular case, such absences must be considered unreasonable.[95]

As a result of this statement of position the problems created by the peculiar wartime conditions in many plants were solved but as an incident thereof, numerous administrative difficulties were encountered. For example, employers as well as the Divisions were faced with the need for determining in particular cases whether absences were reasonable or unreasonable and whether unreasonable absences included absences for longer periods than were allowed under established company plans for sick leave and "annual" leave. Since the answer to this latter question was determined to depend upon the reasonableness of the particular leave plan, employers had to decide for themselves and the Divisions in many instances were compelled to rule on specific leave plans to determine whether the leave plans were "reasonable" in nature. Employers were thus subject to considerable uncertainty prior to obtaining the opinion of the Divisions and the Divisions were faced with an undesirable administrative burden in giving such opinions. In my opinion, moreover, the building of

[95] Release A-9 dated August 24, 1944, "Payment on 'Salary Basis' for Executive, Administrative and Professional Employees Clarified."

such an elaborate structure of interpretation upon the simple phrase "on a salary * * * basis" should be avoided if possible in the interests of good administration.

The testimony at the hearings indicated that the practice of disciplining bona fide executive, administrative, and professional employees by making deductions from their salaries had been a wartime phenomenon, resulting from rapid upgrading, the pressure of long hours, and other temporary conditions. Such deductions are rarely made today. The disciplining of such employees in the rare instances where it is needed is usually accomplished in other ways than by deductions from salary.[96] There appears to be no present need for a definition of "salary basis" as difficult to apply as the one now followed by the Divisions, particularly since it is not consistent with the common understanding of the phrase as it applies to bona fide executive, administrative, and professional employees.[97] In view of the changed conditions, payment of anything less than the full salary seems to cast doubt upon the bona fide character of the employee's executive, administrative, or professional status.

I recommend that the official explanation of the regulations [98] make it clear that the term "on a salary * * * basis" requires that the employee receive his full salary for any week in which he performs any work without regard to the number of days or hours worked.[99] This

[96] See, for example, transcript, pp. 23, 134-135, 399, 630-632, 1001, 1336-1337, 2759.

[97] Some representatives of employers urged that provision for deductions be retained. For example, see transcript, p. 1359.

[98] Later in this report the recommendation is made to issue an explanatory bulletin together with the revised regulations.

[99] This recommendation is not intended to affect the Divisions' general position under the act that payment is not required in any week in which no work is performed.

recommendation may be accomplished by defining the term in the following language:

> An employee will be considered to be paid on a salary basis within the meaning of these regulations, if under his employment agreement he regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the number of hours worked in the workweek or in the quality or quantity of the work performed.

The question may be raised in connection with the above recommendation whether the proposed definition of "salary basis" in all cases excludes employment on a commission basis, hourly rate, percentage of profit, or similar methods of payment resulting in varying amounts of weekly earnings. It should be noted that the language "a predetermined amount constituting all or part of his compensation" is used in the proposed definition. It is the purpose of this phrase to make it clear that additional compensation besides the salary is not inconsistent with the salary basis of payment. The requirement will be met, for example, by a branch manager who receives a salary of $75 or more per week and, in addition, a commission of 1 percent of the branch sales. The requirement will also be met by a branch manager who receives a percentage of the sales or profits of his branch, if the employment arrangement also includes a guarantee of at least the minimum weekly salary (or the equivalent for a monthly or other period) required by the regulations. Another type of situation in which the requirement will be met is that of an employee paid on a daily or shift basis, if the employment arrangement includes a provision that he will receive not less than the amount specified in the regulations in any week in which he performs any work.[100] The

[100] A representative of the coal industry testified that section foremen who are paid on a daily basis plus a minimum weekly guarantee enjoy all the privileges of salaried employees. Transcript, pp. 1522-1524.

test of payment on a salary basis will not be met, however, if the salary is divided into two parts for the purpose of circumventing the requirement that the full salary must be paid in any week in which any work is performed. For example, a salary of $100 a week may not arbitrarily be divided into a guaranteed minimum of $75 paid in each week in which any work is performed, and an additional $25 which is made subject to deductions.

Failure to pay the full salary in the initial or terminal week of employment is not considered inconsistent with the salary basis of payment. In such weeks the payment of a proportionate part of the employee's salary for the time actually worked will meet the requirement. However, this should not be construed to mean that an employee is on a salary basis within the meaning of the regulations if he is employed occasionally for a few days and is paid a proportionate part of the weekly salary when so employed. Moreover, even payment of the full weekly salary under such circumstances would not meet the requirement, since casual or occasional employment for a few days at a time is inconsistent with employment on a salary basis within the meaning of the regulations.

* * * *

"Kantor Report"

March 3, 1958

* * * *

Function of the Salary Requirement

The salary tests in the definitions of executive, administrative and professional employees have been an integral part of the regulations since 1940. The terms bona fide executive, administrative and professional imply a certain prestige, status and importance, and the employee's salary serves as one mark of his status in management or the professions. It is an index of the status that sets off the bona fide executive from the working squad-leader, and distinguishes the clerk or sub-professional from one who is performing administrative or professional work. Generally speaking, salary is a good indicator of the degree of importance attached to a particular employee's job.

Essentially, the salary tests are guides to assist in distinguishing bona fide executive, administrative, and professional employees from those who were not intended by the Congress to come within these categories. They furnish a practical guide to the investigator as well as to employers and employees in borderline cases, and simplify enforcement by providing a ready method of screening out the obviously nonexempt employees. Employees who do not meet the salary test are generally also found not to meet the other requirements of the regulations.

1880: DEFINING & DELIMITING THE TERM "ANY EMPLOYEE EMPLOYED IN A BONA FIDE EXECUTIVE, ADMINISTRATIVE, OR PROFESSIONAL CAPACITY" (ESA/W-H)

(May 13, 1996)

Priority: Economically Significant

Legal Authority: 29 USC 213(a)(1)

CFR Citation: 29 CFR 541

Legal Deadline: None

Abstract: These regulations set forth the criteria for exemption from the Fair Labor Standards Act's minimum wage and overtime requirements for "executive," "administrative," "professional" and "outside sales employees." To be exempt, employees must meet certain tests relating to duties and responsibilities and be paid on a salary basis at specified levels. A final rule increasing the salary test levels was published on January 13, 1981 (46 FR 3010), to become effective on February 13, 1981, but was indefinitely stayed on February 12, 1981 (46 FR 11972). On March 27, 1981, a proposal to suspend the final rule indefinitely was published (46 FR 18998), with comments due by April 28, 1981. As a result of numerous comments and petitions from industry groups on the duties and responsibilities tests, and as a result of recent case law developments, the Department concluded that a more comprehensive review of these regulations was needed. An ANPRM reopening the comment period and broadening the scope of review to include all aspects of the regulations was published on November 19, 1985, with the comment period subsequently extended to March 22, 1986.

The Department has revised these regulations since the ANPRM to address specific issues. In 1991, as the result of an amendment to the Fair Labor Standards Act (FLSA), the regulations were revised to permit certain

computer systems analysts, computer programmers, software engineers, and other similarly skilled professional employees to qualify for the exemption, including those paid on an hourly basis if their rates of pay exceed 6½ times the applicable minimum wage. Also, in 1992 the Department issued a final rule which provided, in part, that an otherwise exempt public sector employee would not be disqualified from the exemption's requirement for payment on a "salary basis" solely because the employee is paid according to a public pay and leave system that, absent the use of paid leave, requires the employee's pay to be reduced for absences of less than one workday. These revisions were limited in nature and the regulations are still in need of updating and clarification. In addition, recent court rulings have caused confusion as to what constitutes compliance with the regulation's "salary basis" criteria in both the public and private sectors. All of these factors have led the Department to conclude that a review of these regulations is both necessary and appropriate.

Statement of Need: These regulations set forth the criteria used in the determination of the application of the FLSA exemption for "executive," "administrative," "professional," and "outside sales employees." The existing salary test levels used in determining which employees qualify as exempt from the minimum wage and overtime rules were adopted in 1975 on an interim basis. These salary level tests are outdated and offer little practical guidance in the application of the exemption. In addition, numerous comments and petitions have been received in recent years from industry groups regarding the duties and responsibilities tests in the regulatlons. These factors, as well as recent case law developments, have led the Department to conclude that a review of these regulations is needed.

These regulations have been revised in recent years to deal with specific issues. In 1991, as the result of an

amendment to the FLSA, the regulations were revised to permit certain computer systems analysts, computer programmers, software engineers, and other similarly skilled professional employees to qualify for the exemption, including those paid on an hourly basis if their rates of pay exceed 6½ times the applicable minimum wage. Also in 1991, the Department undertook separate rulemaking on another aspect of the regulations, the definition of "salary basis" for public-sector employers. This interim final rule provided, in part, that an otherwise exempt public-sector employee would not be disqualified from the exemption's requirement for payment on a "salary basis" solely because the employee is paid according to a public pay and leave system that, absent the use of paid leave, requires the employee's pay to be reduced for absences of less than one workday. In 1992, the Department issued its final rule on this matter.

Because of the limited nature of these revisions, the regulations are still in need of updating and clarification. In addition, recent court rulings have caused confusion as to what constitutes compliance with the regulation's "salary basis" criteria in both the public and private sectors.

Alternatives: The Department has met with affected interest groups in developing regulatory alternatives. Following completion of these outreach and consultation activities, full regulatory alternatives will be developed.

Although legislative proposals have been introduced in the Congress to address certain aspects of these regulations; the Department will continue to pursue revisions to the regulations as the appropriate response to the concerns raised. Alternatives likely to be considered include particular changes to address "salary basis" and salary level issues to a comprehensive overhaul of the regulations that also addresses the duties and responsibilities tests.

Anticipated Costs and Benefits: Some 23 million employees are estimated to be within the scope of these regulations. Legal developments in court cases are causing

progressive loss of control of the guiding interpretations under this exemption and are creating law without considering a comprehensive analytical approach to current compensation concepts and workplace practices. These court rulings are creating apprehension in both the private and public sectors. Clear, comprehensive, and up-to-date regulations would provide for central, uniform control over the application of these regulations and ameliorate this apprehension. In the public sector, State and local government employers contend that the rules are based on production workplace environments from the 1940s and 1950s, and that they do not readily adapt to contemporary government functions. The Federal government also has concerns regarding the manner in which the courts and arbitration decisions are applying the exemption to the Federal workforce. Resolution of confusion over how the regulations are to be applied in the public sector will ensure that employees are protected, that employers are able to comply with their responsibilities under the law, and that the regulations are enforceable. Preliminary estimates of the specific costs and benefits of this regulatory action will be developed once the various regulatory alternatives are identified.

Risks: This action does not affect public health, safety, or the environment.

SGT. DAY DEPOSITION

September 1, 1989

* * * *

[6] Q. Are you assigned to a particular shift?

A. I work permanent night watch.

Q. Okay. And what does that mean, night watch?

A. I report—The night watch works from eleven-ten at night to seven-ten in the morning. It's a split shift.

Q. What do you mean by a split shift?

A. Some report at ten-fifty at night and get relieved at six-fifty in the morning.

Q. Are you paid some kind of shift differential or anything for working nights?

A. Yes, sir.

Q. That's figured in your salary?

A. Yes, sir.

Q. Do you know what that differential is or how that's figured?

A. 10 percent for the hours you work.

* * * *

[7] A. Well, if you work eight hours a night you get paid for 10 percent of your eight hours. If you're off, you don't get paid that extra 10 percent.

Q. So do you have a base salary that's something less than thirty-seven thousand and one dollars or is that your base salary and you get 10 percent over and above that?

A. I get 10 percent over and above that.

* * * *

ROSALIE CORTELYOU DEPOSITION

September 1, 1989

* * * *

[6] Q. From other than department funds, are there any police—sergeants who get overtime?

A. Yes.

Q. And can you tell me in what departments these sergeants exist?

A. Which departments they're like assigned to?

Q. Yes. Well, first of all, do you have a number as to how many get paid overtime, whether it's from department funds or not from department funds?

MR. RENICK: Well, let me interject an objection here in defining what you mean by overtime. I'm not sure—

Q. (BY MR. RIVERA) Who get time and a half, who get paid for anything over forty hours.

A. We have no sergeants getting paid over forty hours for the department.

Q. But do they get paid overtime from some other source doing police work for the department?

A. I don't know exactly what you mean by that. You know, like patrol duties you mean or—funds coming to the department?

[7] Q. No. Let me rephrase the question. Perhaps it will be more clear. I understand your previous testimony to be that there are some sergeants who get paid overtime but not from department funds; is that a correct characterization?

A. That's correct.

Q. Okay. I want to know who those sergeants are and what departments they're in.

A. They would be less than a half a dozen. They might be six max. Currently there's only one that I know of.

Q. And who is that?

A. Sergeant William Conreux.

* * * *

[14] Q. Now Ms. Cortelyou, I'd like you to assume for a moment that we have a sergeant who's got no rec days, no more days off, and has used up his forty hour bank, and he decides that he wants to take two hours off. Would he be paid for those two hours?

A. Yes.

Q. Now that's if it was an excused absence, is that correct?

A. Correct.

Q. But what if it were unexcused?

A. I've never seen a case like that.

Q. But would he be docked if he took off?

MR. RENICK: Well, you're asking her to speculate. She's just said that she's never seen a case like that, so I'll object to the question, speculative.

Q. (BY MR. RIVERA) But that doesn't mean that you wouldn't know. The department doesn't take—pay people for time that they don't work when it's unexcused, is that true?

A. How would I know if it was unexcused? I wouldn't dock his pay, no. I have never docked a sergeant or lieutenant or a captain if they were absent for just a couple of hours.

Q. Well, you said you've never docked it, [15] but I just want to know if you can dock it. I'm interested in a situation where a sergeant says to his lieutenant, I want to take three hours off, and the lieutenant says, no, you can't take three hours off, I need you here. He goes home anyway.

A. That would be disciplinary then.

Q. But would he be docked for those three hours that he was absent without leave or absent without being excused?

A. Not at that point, no. He would have to—There would be an allegation of misconduct. He'd have to go through Internal Affairs, waivers would be signed or a board trial. Again, that's disciplinary. We would not dock him within an immediate time frame, you know, within the next paycheck or anything like that. We would not take time away from him, no—dollars.

Q. You would still pay him and then he'd be subject to discipline later?

A. Correct.

Q. But if the officer had overtime and he left and he said I'm leaving even though he wasn't excused—I'm

talking a sergeant—and he leaves even though he's unexcused, would they then take his four hours overtime?

[16] A. I would guess they would. Again, it's up to the discretion of his supervisor.

Q. Do you know why they would take his overtime if he's absent, the sergeant—and all my questions, by the way, will refer to sergeants unless I'm referring specifically to a patrolman—do you know why they would take away his—part of his forty hours overtime and not dock him if he's unexcused?

A. No, I wouldn't know that.

Q. You don't make that policy?

A. No, I don't.

Q. Does a police officer—I'm sorry. Does a sergeant get holiday pay and rec time?

A. Yes.

Q. And is that measured in hour increments or is it measured in day increments?

A. It's so many days converted to hours.

Q. So would it show up on your computer in hours?

A. Yes.

Q. So if the officer wanted to take rec time he can take it less than a day, he can leave at noon and just take the rest of it as rec time?

A. I don't believe that's true. I don't [17] know what the policy is at the district level.

Q. Okay. But you compute the bank in hours and not in days?

A. Correct.

Q. So that one day would be eight hours, and if he had five days of rec time he would have forty hours and that's how it's listed?

A. Correct.

Q. Do you compute vacation in terms of hours?

A. Yes.

Q. Somebody wanting to know how much time they had, vacation time, you would say they had forty hours as opened to five days?

A. Correct.

Q. Now the shift differential, when does that apply to a sergeant?

A. It's any full hour that they work between eleven at night and seven in the morning.

Q. So that too is measured in hour increments?

A. Per statute, yes.

Q. Which statute, state statute or Federal?

A. State statute.

Q. And what is that increment?

A. It's 10 percent.

[18] Q. So let's say somehow a sergeant is working and he gets carried over, he's supposed to stop at eleven but he ends up working till one o'clock the next morning, would he then get a shift differential for those two hours that carried over to—between, say, eleven and one o'clock in the morning?

A. Yes, he would.

Q. Then a sergeant who's scheduled to work from ten or six to two will only get the shift differential from eleven o'clock to two in the morning?

A. Correct.

Q. Is there anything else that you measure in hour increments, any other benefits or compensation other than just the wages, you told me hours, vacation—what about sick time? Is that measured in hour increments too?

A. Yes.

* * * *

[29] Q. Now, if that sergeant is working nights, eleven to seven, and has this excused absence, do you [30] pay him his regular pay or do you pay him the shift differential too?

A. I would not pay shift differential because the statute says for each hour worked he will get his eight hour base pay, but not the 10 percent on top of it.

Q. Statute also says that he gets his base pay for each hour worked, doesn't it?

A. He is getting his base pay, yes.

Q. For each hour worked?

A. No, I don't think it says that. It says eighty hours shall constitute—forty hours shall constitute a week.

Q. But you're paying him—the nonshift differential man, you're paying him even though he hasn't worked those forty hours?

A. Say that again, sir.

Q. The man who's not on shift differential working days gets off eight hours for this emergency. You're paying him—

A. —Correct.

Q. —the same rate?

A. Right.

Q. The man on shift differential that has the same excused absence, you're paying him but just [31] straight time, not his shift differential?

A. Correct. I'm paying them both the same way.

Q. Where is the sergeants' overtime records kept? Who keeps those? What I mean, how much he has left from the time he got promoted to sergeant. Who would have that information?

A. It's maintained in the computer. But there are records at the district for thirteen months and I'm sure each officer has a copy of his own records.

Q. But you don't have it in your department?

A. I have blue slips of time taken and time earned going back maybe ten years.

Q. There's no time earned on a sergeant though?

A. No, prior when he was a police officer.

Q. So you do have that record in your department?

A. Yes.

Q. Time that he earned and accumulated prior to becoming a sergeant?

A. Yes, sir.

Q. And then you also have the time that he used since becoming a sergeant?

[32] A. Correct.

Q. So then you have a balance on hand, so to speak?

A. Yes.

Q. Mr. Rivera asked you about the sergeant who would take unexcused time off, and I believe you said he would be disciplined, is that correct; you would not dock him in pay, he would be disciplined?

A. Based on his assumption that the officer just took off without authorization, yes, it would be disciplinary.

Q. It would be disciplinary? And then you also said that you would not deduct anything current from his pay during that pay period?

A. That's correct.

Q. Let me give you a hypothetical question. A sergeant misses a day of work, just flat out misses. In his next paycheck there's going to be no deduction for the eight hours missed, is that correct?

A. That's correct.

Q. He gets disciplined and let's say he's suspended for two days because of that infraction. What happens to his subsequent pay?

A. He would lose two days pay.

Q. Would he still be paid for the day he [33] didn't work?

A. If that was—It would depend if that was part of the discipline that was handed down. They may say your punishment is two days plus the day you were not here. It's all hypothetical.

Q. So has that happened?

A. Not to my knowledge. I think they incorporate that in the disciplinary action.

Q. So you think that he's deducted for the time he actually missed by reason of the disciplinary action?

A. I really don't know. I should not even be addressing that.

Q. But to your knowledge, you don't pay him for the time he missed, do you?

A. If I don't know what the end results is, I don't know—I mean, I know I am docking someone for disciplinary action, but I don't know what the result of that is, you know, if it includes that day or not. That would be a matter for Internal Affairs.

Q. Have you ever seen a person disciplined and be docked for less time than he actually missed?

A. I don't recall offhand. I couldn't address that honestly.

Q. Well, wouldn't that strike you—if that [34] had happened, don't you think you'd remember?

A. No.

Q. You don't? Do you have the records that you could find the answer to that question?

A. For a specific individual I could, yes.

Q. But I mean just a search of your records, wouldn't it show up if a man was disciplined and given two days without pay? Would your records show how much time he had actually missed for that disciplinary action?

A. Yes, it would show that.

Q. So you could balance those out?

A. Yes.

Q. What happens to a sergeant when he's sick and he takes sick time? Does he have a bank, so to speak, of sick time?

A. Yes, they do.

Q. And if he gets ill on the job he will be charged with, let's say, four hours or sick time, is that correct?

A. He could or couldn't be charged. Again, it's up to the commander, watch commander, or captain.

Q. What I'm trying to get at—Mr. Rivera sort of covered this—you do measure sick time in hours?

[35] A. Correct.

Q. How many hours does a sergeant get per year of sick time?

A. All police personnel get twelve—they get eight hours per month. They earn at eight hours per month, one day per month.

Q. Of—

A. —so it would be twelve.

Q. Times eight, whatever that is?

A. Yes, ninety-six.

Q. In hours?

A. Yes.

Q. If a sergeant had, let's say, a serious illness and used up all of his sick time and then a month later suffered an injury and had to take additional sick time, what if any adjustment would you make? He has no more sick time and he's sick.

A. They have the option of applying for a furlough with pay.

Q. That's one option?

A. That's the procedure. Yes.

Q. He applies for a furlough with pay?

A. Or a furlough without pay.

Q. Suppose it is an emergency thing, that he has some type of an attack and he can't apply for a [36] furlough with pay, what would happen in that situation, or would he apply for it retroactively?

A. It would be automatic, he would apply for a furlough with or without pay. That is the department procedure.

Q. And then if he's granted the furlough with pay he continues on his regular pay?

A. Correct.

Q. And without pay, then he gets nothing?

A. Correct.

Q. When a sergeant has unexcused absence, unexcused absence, you—I think you said previously you do get some notice of that, either on the duty roster or in some form; you get a notice of that?

A. On the duty roster if they are excused by their commander it will be noted.

Q. But if it's unexcused—

A. —Then there will be an audit form or an allegation of misconduct.

Q. What was the first thing you said, a what form?

A. Administrative report and transmittal.

Q. And what information does that contain?

A. That would be a report written by their commender through the chain of command stating that [37] some-

one missed work, didn't show up for work, left early without authorization, came in late without authorization.

Q. And is that—Is that report transmitted immediately upon the occurrence of the event or is it some time before it filters down to you?

A. Someone is able—Again, talking of sergeants or any rank, we would—we are to get an advance copy or we are to get a copy of those reports and then AWOL's, a memo has to be submitted to our office.

Q. In the case of a patrolman, would you dock him immediately, charge him with time?

A. Yes.

Q. His next paycheck is going to show that he was AWOL?

A. Yes.

Q. And the sergeant you don't?

A. No.

Q. Now are you sure of this, that you treat those two situations different?

A. I don't remember ever seeing an AWOL on a sergeant so—

Q. They're all good guys, huh? If you don't remember—I'm not trying to confuse you. If you [38] don't remember—

A. —No, I'm not confused, but I'm just—it just doesn't happen.

Q. Or at least it isn't reported to you?

A. It's not reported to us.

Q. But you do get AWOL reports on patrolmen within twenty-four hours of the time it happens?

A. Yes.

Q. And in your twenty-four years you've never seen one on a sergeant?

A. I can't recall one, no.

Q. On a sergeant the first time you see one would be in a disciplinary proceeding?

A. That's correct.

Q. You'd get some kind of a notification that Sergeant Jones has been docked two days pay?

A. Correct.

Q. A few minutes ago you told me that you could search your records and determine if Sergeant Jones was docked two days pay, how such time Sergeant Jones had actually missed from duty to be docked that two days pay?

A. That's correct.

Q. And I'm not trying to confuse you. You still stick with that answer?

[39] A. Yes.

Q. You would have something?

A. Yes.

Q. In light of not getting an AWOL report on the sergeant?

A. It would be a suspension, probably a disciplinary action from the board.

Q. Yes, but would you have a record as to how much time the sergeant had actually missed to cause that?

A. Yes. If the duty roster were marked correctly, yes.

Q. Okay. Do you get or—Cross that.

There's a departmental regulation now, I think it came in August of 1988, which says in addition to marking the duty roster the commanding officer or watch commander must submit a memo to the area sergeant or the area major or whatever on all excused absences. Are you familiar with that regulation?

A. That may be a bureau order. We do not maintain the records on that.

Q. Do you get a copy of the memo—

A. —No.

Q. —that the captain of the Eighth [40] District would submit when he excused Sergeant Jones for a half a day to go to his neighbor's funeral or something?

A. No, we do not get those.

Q. Would it show on your duty roster that Jones missed four hours for some reason?

A. Yes.

Q. That would show—

A. —That's why they're writing the memo.

Q. Pardon?

A. That's why they're writing the memo.

Q. I know that. But that shows on your duty roster? You just disregard it as far as pay goes?

A. The commander has the discretion to do that.

Q. Yes, I understand that, but I mean, you disregard that for pay purposes?

A. Correct.

* * * *

ROBERT SCHEETZ DEPOSITION

October 4, 1989

* * * *

[11] Q. Do you recall this and was there a period in '86 when—when—I get the implication from the memo that there was a change that before that records weren't kept and then records started to be kept; is that right?

A. If my memory serves me correctly, this was prompted by the president of the Board of Police Commisioners asking me if we could determine how many extra hours our management personnel put in, you know.

Q. Okay.

A. And I—They're supposed to write in the duty ledger, you know, when they do—they're doing duties other than the ones they're assigned to; for instance, if they're—if they're in court, that type of thing.

Q. Right.

A. But I couldn't say that we were keeping the records, so I issued a memorandum that they should do this and maintain it and put a log in the district station so that we could check periodically [12] and see that they are maintained.

Q. Then would the procedure be that after—if not before but at least after this memo, or after this memo plus some time to get it put into effect, that sergeants and lieutenants working in the department, their work time should be kept in an hourly record, records should be kept of their time they're spending working for the department?

A. Well, you know, we had to keep track of the time whether it was by the hours or was by what I don't know, but, for instance, we had—if we had a sergeant who was detached, for instance, to another unit, they would mark on the duty roster detached there and if indeed there was extra duties that they were performing there they were responsible for logging it.

* * * *

[29] Q. And am I right in understanding that if you had a sergeant and he had eight persons or nine persons in that situation, some of those people [30] because they make overtime would make more than the sergeant?

A. I would say that's a fair statement.

Q. Okay.

A. Now, the—I think our ninth year patrolman makes close to thirty-one thousand, you know, so—

Q. So if you add a nine- or ten-year patrolman who had overtime, they would most likely make more than the sergeants they were working with?

A. I think we have steps in the sergeant grade, so they would probably make more than the first year sergeant.

Q. Okay. If a sergeant is absent—a sergeant could be absent without leave, I assume?

A. Oh, yes.

Q. And what would happen to a sergeant if he was absent without leave?

A. He would be subject to charges.

Q. And as a result of the charges could he be docked pay?

A. I would say that he'd probably be—he could be—he could be suspended in lieu of—say maybe one day suspension, two day suspension. I don't recall that we've ever docked anybody, you know, [31] like you're docked ten dollars or somehting like that. I don't think—I don't recall in my time in the department that that ever happened.

Q. If the sergeants generally understood that if they were—if their shift ran from eight to five, which it probably wouldn't, but if the shift ran from eight to five if the sergeant understood that he was supposed to be there, and if their understanding was that it was a department policy if they didn't come in without an excuse for four hours that they wouldn't be entitled to pay for that four hours, would they be wrong, they should be paid even if they don't come to work?

MR. RENICK: I'm going to object to the question if you're asking him what he thinks some sergeant's who's unidentified understanding might be. I don't think that's a proper question.

Q. (BY MR. LEIBIG) If a sergeant had the understanding that if they just took four hours to go to a ball game without ~~an ex~~excuse that they would expect not to be paid for that time, would they be incorrect? Would they be entitled to be paid for the time even though they didn't come to work?

MR. RENICK: I thing it's two different questions. I object to the form.

[32] Q. (BY MR. LEIBIG) I ask the second question.

A. I think that a sergeant that was supposed to be at work at eight o'clock and didn't come in until twelve knows he would be subject to disciplinary procedures, and, again, what form that would take would be up to the Board.

Q. Of course. And would the disciplinary procedures —The disciplinary procedure would be based on the fact that the sergeant was AWOL, right?

A. (Indicating).

MR. RENICK: You have to answer verbally so that she can put it down.

Q. (BY MR. LEIBIG) Is that right?

A. Yes.

Q. And in order to sustain that charge the department would not have to prove a safety violation; is that right? In order to sustain such a charge of AWOL would the department have to prove that a safety violation had occurred?

A. I don't understand safety violation.

Q. Is the reason that you would be disciplined if you were AWOL because it would cause a safety violation? I assume the answer is no. The reason you would be disciplined for being AWOL is [33] because you weren't there when people thought you should be there, correct?

A. Right.

Q. There isn't another reason for it? Well, I don't mean to be mysterious. There's some regulation in the Fair Labor Standards Act that says discipline for safety violations falls in another category than other forms of discipline. It isn't under the regulation that provides that you can be disciplined for a safety violation, it's under a specific regulation for AWOL, correct?

A. We believe—Well, I'd say correct, yeah.

Q. And just for the record, in the police manual for St. Louis there's a list of disciplinary violations, I think it's—and one of the—Let me find it so I can show it to you so you can be clear. And one of the violations is 7.004C and it says absent from duty without leave, and that's what a person would be—a sergeant could be charged with?

A. Right.

Q. Just so there's no doubt. Now, if a sergeant or a lieutenant didn't come to work—I got to back up from that.

I understand that when a sergeant is first promoted to sergeant he will often have forty [34] hours compensatory

time or overtime on the books that he earned prior to becoming a sergeant; am I right in that?

A. Yes.

Q. And if one of those sergeants takes this four hours off to go to his kid's ball game or something, am I right that if he had any of the time it would be charged against that, that bank would be reduced until it was gone?

A. I think those cases would be handled on a case by case—you know, some lieutenants would handle it one way and some would handle it another, you know. I think that if they had overtime and they were aware that they did have the overtime they may well take it that way, but I don't think they would have to take it that way.

Q. But it is probably appropriate if the sergeant said I'm going to take off part of a day today because my wife has to go to the dentist and I need to drive her, the lieutenant would say okay, go ahead, but I'm going to take two hours out of your bank if the guy still has got forty hours in his bank?

A. I think they carry that over when they get promoted so they don't lose it.

* * * *

[40] Q. Okay. Do you know if a sergeant has ever been disciplined for AWOL say in the recent past, in the last three or four years?

A. I can't recall any specific case, but I would say yes.

Q. And do you know—you may not know, but do you know of any sergeant who's ever been disciplined for missing work and the discipline included some loss of pay? I mean, everybody who missed work, when they get discipline am I right that most of the time when they're disciplined includes some loss of pay? I mean, they didn't come to work, I would assume that.

A. There's a chance that they would. I don't recall it.

* * * *

RAY BURGDORF DEPOSITION

October 4, 1989

* * * *

[49] Q. (BY MR. RIVERA) Did you have forty hours comp time accumulated when you became sergeant?

A. Yes, I did.

Q. And while you were sergeant did you use any of that comp time?

A. I used every bit of it.

Q. What would you use it for?

A. An extra day off, some special event would come up, wedding, things of that nature.

Q. If you wanted to take say less than a day off for something personal, would you be required to use four hours of comp time if you wanted to leave four hours early?

A. If I had the four hours, yes.

Q. And were you required to use that comp time before you would be excused?

A. Yes.

* * * *

LARRY PATTISON DEPOSITION

October 4, 1989

* * * *

[13] Q. If you want me to go through one—Okay. Is sergeants' pay subject to deduction if they miss part of a day?

A. No.

Q. If a sergeant misses part of a day without an excuse and is AWOL—

A. Uh-huh.

Q. —may the sergeant be disciplined?

A. Yes.

Q. May the discipline include the docking of pay?

A. The discipline could include suspension for a particular number of days, which would be loss of pay for that day.

Q. So during that pay period their pay would be reduced for that pay period by that day that they were suspended?

A. Yes.

Q. Could a sergeant who was absent without leave who had compensatory time on the books from his pre-sergeant lose some of that time if they [14] were AWOL for part of a day and they had the time on the books?

A. Now, no, you cannot—you no longer do that in the police department.

Q. When did that change?

A. I am not sure.

Q. What would happen—Suppose a sergeant is assigned to a precinct, it's eight o'clock in the morning, he's supposed to report to work.

A. Uh-huh.

Q. And he doesn't report until noon.

A. Uh-huh.

Q. Would—And he has twenty hours comp time on his record.

A. Uh-huh.

Q. Would he be dock—Would he be—Could he use that comp time toward those four hours he was late?

A. I don't believe so under those circumstances. He could use the time if he requested to be off.

Q. No, but he didn't request to be off.

A. No, there would be an investigation/allegation made against him if he didn't report for duty on time.

[15] Q. Okay. Are sergeants required when they're absent to use up their overtime banks, then their leave time, and then their sick time if they're absent for a period of time?

A. What reason would they be absent for?

Q. They went to a baseball game with their son, for example.

A. If they requested to be off to do that?

Q. Well, does it—if it makes a difference—

A. —Certainly.

Q. Yes, if they requested to be off.

A. Yes, he would have to use what time he had coming, right.

Q. Even if it was part of a day, even if he was only out half a day, he would still have to use some of that time, correct?

A. (Indicating).

Q. What if he didn't ask to be off?

A. If he didn't ask to be off then there would have to be an allegation started against him with disciplinary procedures implemented.

Q. And a supervisor wouldn't have the authority to take some of his leave and attribute that to the time unless he asked in advance?

A. There's nothing in writing that says he [16] can do that.

Q. Is there anything in writing that says he can't?

A. Only thing in writing that says if you do not report for duty on time an investigation will be made to determine your whereabouts and if the—if—you know, if it's not an accident, something like that, that keeps you from coming in, being at the hospital, then you bring an allegation against the individual.

Q. All right. So it is—And with regard to the sergeants, if a sergeant's shift is from eight to four, and that wouldn't be a regular shift but assume that is a shift.

A. Uh-huh.

Q. And a sergeant is required to be there from eight to four and can't unilaterally absent himself for part of that shift without being in trouble for being AWOL.

A. Correct.

Q. If he did absent himself for part of it and had a hearing and it was proved that he did, he would be found to be absent without leave?

A. There would be an investigation to find out why, correct.

[17] Q. And there's no basis to automatically excuse that because he's salaried?

A. Correct.

Q. Now, do—do—would the same be true of lieutenants?

A. Yes.

* * * *

TRIAL TRANSCRIPT VOLUME I

September 15, 1993

The Court

[40] MR. RENICK: Which I raised yesterday and I don't know whether you want to address this or whether you've had time to consider it and that is the affect of your ruling on October 31, 1991, with respect to the salary test. Our position is that based on your ruling, the salary test for the remaining Plaintiffs is no longer an issue but we need to,—I think we need to clarify that,—

THE COURT: On the record.

MR. RENICK: in order to know whether I'm going to present evidence on that issue.

THE COURT: Alright, the *FSLA* fixes two hundred and fifty dollars ($250.00) a week as the boundary, as I remembered. Is that correct, then? And your contention is there is no Sergeant who makes less than two fifty a week.

MR. RENICK: Well, that's a seperate issue, your Honor. Plaintiffs have stipulated that every Sergeant makes more than two hundred fifty dollars ($250.00) per week.

THE COURT: Alright.

MR. RENICK: There was, and perhaps we can put this off till later too as well, to give the Court time to review the ruling from October, 1991, but the question was,—dealt with things like whether they were having,—being subject to deductions for partial day absences,—

THE COURT: Oh, that's right, that was the ques-[41] tion, —

MR. RENICK: And those issues, you ruled quite clearly that Lieutenant Delgado and Plaintiffs made all the arguments with respect to Delgado and you rejected those arguments and found that Lieutenant Delgado specifically was paid on a salary basis, within the meaning of the *FLSA*. The Sergeants in that portion of your

ruling, then you went on to address Sergeants and you said, the Court believes the only remaining issue for trial with respect to Sergeants is this issue whether or not management is a primary duty which we have always understood to mean that your ruling with respect to salary basis was the same for Sergeants as it was for Lieutenant Delgado. If that's not the case, then we need,—

THE COURT: That is the case. That's what I intended to do.

MR. LIEBIG: Just very briefly on that point, and maybe we can cover it in argument, but,—so you know our position on the point.

THE COURT: Alright.

MR. LIEBIG: The, your ruling was made in October of 1991.

THE COURT: Right.

MR. LIEBIG: And early in September of 1991 the regulations applicable to the salary tests were amended by [42] the *Fair Labor Standards Act* part of the Department of Labor in order to reflect more clearly the special problems in the public sector. Those amendments and their preamble added to the law and the clarity of how the salary test works. In many ways to the advantage of the City of St. Louis and in support of some of the points made in your decision. However, they also clarified some other parts of the salary test which we think are particularly applicable to the Sergeants in this case and secondly, your decision includes in it, and you can review it, says that this point, there has been no evidence that deductions that would be not allowed under the regulations have been made, we think the salary test remains in the case of a very limited part with regard to Sergeants is a very specific issue we want to raise which I can cover in argument but it's not extremely complicated and we can go through the regulations,—

THE COURT: Alright, well I think we can hear that when we hear the evidence and it's pertinent to that time. There was some argument about whether or not Sergeants

would be,—that there'd be penalties assessed against them, deduction for failing to report to work or some allowance not made for court time, things of that kind. I don't think that that is likely to be paramount in our decisions here. Seems to me that's a minor point. [43] Those are all guidelines that have been contained in various statutes and various rulings by different courts throughout the country as examples of, and that's all they really are, and I think there could be differences of opinion and the totality of the circumstance has to be decided by the hearing judge rather than citations from various cases wherein in one city a Sergeant was docked because he came to work late or things of that kind. I think they're all examples and they're not rules that we are bound by. They're just examples, indications of whether the parties are exempt and whether the salaries are standard. Alright, we'll take it as the trial proceeds. Okay. I think that's enough. * * *

* * * *

September 15, 1993

Testimony of Kurt Delabar

[90] Q Alright. Now, does the Board of Police Commissioners have the authority to set pay rates for officers of this particular police department?

A No sir.

Q Alright. How are the,—

MR. RENICK: And we have stipulated that, Exhibit C, your Honor, is a compilation of the salary matrix over the period of time here.

[91] BY MR. RENICK:

Q How are those salaries determined, Mr. Delabar?

A Salaries are determined by state statute. By Missouri State Statute.

Q You mean by the State Legislature?

A State Legislature, yes sir.

Q Makes the decision? Do you know any more about the process than that? About how the salaries are set?

A Once the salaries are,—once the state statute is passed by the legislature, the City of St. Louis, then will review that and has the authority to pay salaries based on within, what the statute says. The Board of Alderman.

THE COURT: Let me interrupt you for a moment. Does the City have the authority not to pay? Can they say, "I'm not going to pay the salary provided by the state statutes?"

THE WITNESS: The state statutes read that they will be paid up to a certain amount so they can,—the City can turn around and give no raise, yes sir.

THE COURT: I didn't ask about raises. I mean, if the salary's fixed for probationary patrolmen at Twenty-four thousand dollars ($24,000.00), can the City say, "I'll only pay nineteen thousand ($19,00.00)." ?

THE WITNESS: That, I don't know.

BY MR. RENICK:

[92] Q Well, the statute, I think, as you said, sets a maximum salary, correct?

A Yes sir.

* * * *

[130] Q In looking, and I'll explain it to you, in looking at sub-section (3) of the code, by the way, for the witness, what this code does is have the salary code as you testified and so forth, it sets it out. I notice in part (b) it says, in the last sentence of number three which is on the second page in the exhibit, it says,

> "No additional compensation or compensatory time off for overtime, court time, or standby court time shall be paid or allowed any officer in the rank of Sergeant or above."

Now, if it seems to be a state code provision that says the City of St. Louis and the St. Louis Police Department couldn't pay overtime pay to Sergeants, are you familiar with that?

A Not completely, but I mean, I believe that's what it says.

Q. Okay. Now, the reason I wanted to point out that, is that isn't it true that the City of St. Louis at times does pay overtime pay to police Sergeants? Aren't some police Sergeants at time paid overtime pay?

[131] A Not to my knowledge.

Q During your deposition, didn't you testify that during the flood police Sergeants that were ordered to work overtime were paid for overtime at the straight time rates above their pay salary?

A They were paid for time but I don't know that it was,—that was not overtime as far as I know.

Q It was time outside their regular hours and they received extra compensation above the state statutory level at straight time, didn't they?

MR. RENICK: I think there's no foundation for this. There's compensation above the authorized levels within the state's statutes. There's no proof of that.

MR. LIEBIG: I know, that's why I'm asking questions about it but there will be.

BY MR. LIEBIG:

Q Didn't you testify during your deposition that during the flood, special procedure was established and issued under an order that Sergeants who did work that time would be paid, above their normal compensation at straight time for during the flood?

A They were paid a bonus for working that above their,—the base pay, yes sir.

Q Okay. So they worked hours, I understand you don't want to call it overtime, but when they worked hours out- [132] side their regular scheduled work, extra hours, they received extra compensation for it during the flood by order of the department and the Police Board?

A When they worked during the flood detail, yes sir.

Q Alright. Now, are there any other occasions when police Sergeants by the St. Louis Police Department are

paid above the salary in the state code that you know of? If you want me to give you some examples or questions aren't too specific,—

MR. RENICK: Well, I object because there's no foundation that any Sergeant has ever been paid above the state code. No evidence.

MR. LIEBIG: Okay. Were any of this,—

THE COURT: Alright, go ahead. I'll overrule it, yes. I'll overrule the objection.

BY MR. LIEBIG:

Q Okay. Have there been occasions when police Sergeants have been paid overtime at time and a half? If you're not aware, say,—

A Again, not to my knowledge.

Q Okay. When,—the City also designated Chief Schuetz as a witness and in his deposition, he testified that for a time, the Sergeant assigned to the Armory was paid overtime at time and a half. As you aware of that?

A No sir.

* * * *

[138] Q Okay. And I'll ask you again, just because I want to make sure it's clear before you leave the stand, you were asked about setting rates of pay and you testified that the statute sets the rates for the pay and then you were asked, "Did anybody in the department,—did the department ever,—did anybody have the authority to set rates of pay or adjust rates of pay other than the State Legislature?" And I think you said, "No". Are you sure there aren't incidents, for instance, during the flood and in other places, where the police board has acted to adjust or change rates of pay without going to the State Legislature?

A Not to my knowledge.

Q Again, I just want to make sure, during your deposition, didn't you review an action by the police board that approved overtime as straight time being paid to the people that worked extra hours during the flood? I asked

you about that during your deposition and you explained it to me. Do you remember that?

A Well, they,—during the flood there was an additional, there was basically an additional bare bonus for individuals working the flood, yes sir.

Q Okay. And that is, that was additional pay set by the police board that wasn't called for in the State Legislative, correct?

A Yes sir.

[139] Q Okay. And just for the record, that was an action taken by the police board on,—I'll show it to you because I've only got one copy so I'm going to bring it up and show it to you,—on August 12th, 1993 the police board specifically passed the necessary action to do that, am I right? Have a look at it? I'll show it to you.

A (No verbal response)

Q This is from your deposition and you testified about it during your deposition, and didn't the police board refer to the extra time as flood overtime and approve overtime to be paid to Sergeants who worked those extra hours during the flood?

A Yes sir, I'm sorry, that's correct.

* * * *

[143] THE COURT: Alright. Let me see if I can clear up one point that maybe there's a simple explanation for and maybe there's not. When there was testimony here and you admitted that there was testimony when there was flood overtime allowed to certain officers who worked during the recent river floods, and that gave additional monies over and above the amounts in the statutes, was,—

MR. RENICK: No sir, your Honor, that's my point. There's been no testimony ever that the flood overtime is payments increased anyone's pay over and above the amounts offered up by statute. There's no evidence of that.

THE COURT: Well there's clearly evidence that additional monies were paid to them. In other words, if

they were getting three hundred dollars ($300.00) a week regularly and tney worked overtime, they got four hundred dollars ($400.00) a week or three hundred and fifty. Something. Now, so they did get some extra money during that weekly period and seems to me that maybe an explanation is or was that additional monies were coming to the City because of the regulations of the Federal authorities [144] and so on that additional money is the money that was used or was planned to be used by the police board to pay this extra money. And that same thing would be true for some of the Federal operations. The DEA may have additional monies that they can give to the police department for helping them. If that's the case, then I'd understand it. If you tell me that you're spending additional money over and above what the statute allowed, then I don't know whether there'd be any authority for that nor any requirement of the City of St. Louis to pay the money. Seems to me that the State is required to pay the money according to the statute. The statute fixes the amount and the City must pay the amount that is, up to the maximum amount. Now, there may be another explanation. There may be some people,—there may be some instances where the maximum amounts are not paid. It seems to me, the City is not required to pay the maximum amount to a Sergeant. They may pay lesser amounts and accumulate some extra money. Otherwise, I do think there are problems concerning the,—clarify what happened.

MR. LIEBIG: Your Honor. Your Honor, the only reason for the line of questioning at this point and I think there could be argument later about all sorts of things and there may be a lot of explanations of this, and I think the ones you just gave all in some, one way or [145] another apply to the situation. The only reason I asked the question, is I was responding to the questions done in direct about, he said, "Is the pay rate set by the State Legislature?" And the answers gave the idea that under the state legislative thing, there's nothing the police department could do with regard to setting pay rates and adjusting rates and all I was trying to get at is there are

some situations where they can do something. Those are situations where they get extra money or when the person is not at the maximum, there's flexibility that they could do it and so that, I was only cross examining on this point that the department has no role whatever in setting rates of pay or adjusting pay rates. They obviously do and they have used it.

THE COURT: In some instances they may have extra monies that they can use to pay extra monies and it seems to me that's pretty clear. Either the money they haven't used it all because there's been an absence or vacancy in the positions or someone is paid less than the maximum amounts and so on, every agency that I've ever seen or been associated with and I have had some experience with some, has that situation where extra money comes because of some other governmental operation or because a vacancy occurs and is not filled for three or four months and accumulated money builds up and somebody makes the decision, "Well, [146] we've got extra money here. We can pay this guy because we didn't use it last month." That explains that part of it. Now, if your only point is trying to show that the state authorizes the amount and the police board cannot change it, then of course, that is clear. Once the state fixes the statute, I don't think the statutory amount can require the City to pay more. If they're going to pay more, they've got to get it from some other source.

MR. LIEBIG: My only point was, and I think the reason the questions on direct were asked, I'm talking about relevancy now, has to do with the fact that the *FSLA* regulations in describing management have one of a list of things, the role of various people in setting rates of pay. I think the reason he was asked the direction on direct is to try to establish that not only do the Sergeants not have any role in establishing rates of pay but that nobody in the police department does and I just wanted to point out that there are people in the police department that do play a role in it and they're not Sergeants.

* * * *

TRIAL TRANSCRIPT VOLUME II

September 16, 1993

Testimony of Lt. James Scego

[141] Q And do you know whether they're ever paid additional funds for working overtime?

A No, they're not.

Q Okay. Do you know, do you recall recently there was some extra, there was a policy on extra work because of the flood relief?

A Correct.

Q Do you know if any of them worked?

A All three of them.

Q And did,—

A I'm sorry, two out of three.

Q Okay, and do you know whether they were paid straight time, overtime for that?

A They were paid straight time.

Q Straight time but extra time above their normal.

A Right, paid for the hours they put in.

Q If, are the Sergeants who work under you subject to discipline?

A Yes.

Q And I'm not, I realize none of these probably ever did this so hypothetically, if a Sergeant were for instance, insubordinate, they could be disciplined under the general orders or a manual, correct?

A Under that scenario, yes, they could be.

Q And could the discipline that they received include a [142] suspension for a day or two? It would have to be approved through the procedure, I understand.

A Sure, but it could be longer than a day or two or it could be much less.

* * * *

September 16, 1993

Testimony of Captain Roy Joachimstaler

* * * *

[182] * * * If they worked during the flood problems, of course, there's going to be some reimbursement to the State for certain flood activities that they did. Is that what you mean when you said some, on occasion, there is some occasions when Sergeants were paid additional monies?

THE WITNESS: I don't believe I testified to that, your Honor, about being paid additional monies. The only, I didn't testify to that. I can see where the only time a Sergeant is paid any additional than his salary, would be on shift differential that I'm aware of.

* * * *

September 16, 1993

Testimony of Captain Jack Titone

[205] Q Anyway, the Homicide Lieutenant, of a Sergeant, excuse me. A Homicide Sergeant obviously will work outside the normal eight hour day, from what you've already said, correct?

A That's Correct.

Q Do you use a system where at times when they work excess hours, they get the equivalent of comp time where they take some time off in exchange for having worked extra [206] hours?

A If a Sergeant, if a team was called out say at four o'clock in the morning, 4:01, if that case was over after eight hours, after being at work, we would excuse them.

Q Okay, and so that in fact, there's a practice in Homicide right now, you use, you and the Sergeant, you and the Lieutenant and the Sergeants together are able to use a system of compensatory time and manage that and take care of it is one of the things you have to work on, is that right?

MR. RENICK: I'm going to object to unless we define what compensatory time means.

MR. LIEBIG: I mean by compensatory time, that when people are,—

MR RENICK: What compensatory time means, to me means you get extra time more than that you worked. Maybe that's not the time you're,—

THE COURT: And may not,—

BY MR. LIEBIG:

Q Alright, I'll be glad to see what he means. Do you mean, that if,—you mean,—I think you meant, I think you and I were talking about the same thing. Somebody has to work twelve hour days and the next day he might have to come in and only work four hours and as long as that's approved then he may.

[207] A If a call would come out at 4:01 we, after their eight hours was completed which would have been twelve o'clock, if that assignment was done, the Sergeant would go home because he put in his eight hours.

Q Right. And so all I wanted to get is that it's sort of an administrative thing that I wanted to get in the record. That kind of administrative of the division to take care of extra hours has been used in the past and while it's obviously and administrative problem, you're able to deal with it and work with it.

A Yes, we were flexible enough to change their work hours relative to the case assignment.

MR LIEBIG: Okay. I don't have anything.

* * * *

September 16, 1993

Trial Testimony of Lt. Antoinette Filla

[230] Q If that Sergeant works overtime, does he get paid time and a half?

A No.

Q Does he ever work, does he get paid at all if he works overtime? Extra?

A He can work on the grant program and get paid overtime but that doesn't have anything to do with the police department.

Q Well, I understand that, but if he's working overtime on the grant, he does get paid overtime?

A Through the grant funds, yes.

Q Are the grant funds from the Federal Government?

A Yes.

Q If you know, and you may not, I would understand that, do you know why he gets paid overtime when he's working as a Sergeant under the grant funds from the Federal Government not when he's working for the City, do you know? Just the terms of the grant?

A That's how the grant's set up.

* * * *

[237] THE COURT: I just want to clear up one question that I have in general. When the term "overtime" is used in the Federal Grant concerning this carrier activity, you mean "overtime", you mean those officers who work during that time are paid time and a half or double time, they don't just, they're not just paid at the regular rate but they're paid at some premium rate?

THE WITNESS: Sometimes.

THE COURT: Sometimes.

THE WITNESS: The four officers that are assigned to Motor Carrier Safety Assistance, they work that all the time. Just commercial vehicles. Now the police department pays for some of it and then the Federal Government picks up some of it and the only time they work overtime is after they've put in their eight hours.

[238] THE COURT: Yes.

THE WITNESS: If they spend another four hours then it's overtime.

THE COURT: And at that time, overtime means they're paid either at time and a half or double time or something.

THE WITNESS: Right. Right, or if they work on their day off.

THE COURT: If if they work on their day off.

THE WITNESS: Uh-huh.

THE COURT: Alright, now, for the other Sergeants who don't work in that department, do you ever give comp-time for those Sergeants? Comp-time is commonly used in the Federal system meaning if you work ten hours in one day, the next day you only have to work six.

THE WITNESS: No.

THE COURT: So Sergeants are not given any comp-time in your department at all?

THE WITNESS: No.

THE COURT: Alright. I have no,—

MR. LIEBIG: I just want to make clear for the witness and the record. When he said never give them comp-time in your department, he meant in Traffic, in your section, not in the whole St. Louis Police Department.

THE WITNESS: Right.

* * * *

TRIAL TRANSCRIPT VOLUME III

September 17, 1993

Testimony of Lt. John Burke

[32] BY MR. LIEBIG:

Q Are some of the Sergeants under your command, paid at times, overtime at time and a half, through federal funding or some other program?

A Yes, through a Federal Grant.

Q And is that Federal Grant related to FAST, or one of the other,—

A Through the FAST Unit, yes sir.

[33] Q And so when they're working under the federal authority they're treated as non-exempt from the *Fair Labor Standards Act,* and get overtime?

MR. RENICK: Objection,—

MR. LIEBIG: If you know?

MR. RENICK: —it calls for a legal conclusion. This man has no legal training, he doesn't know whether somebody's exempt or not exempt.

MR. LIEBIG: Alright.

BY MR. LIEBIG:

Q But when they're working under the federal thing, do they get time and half pay?

A Yes sir they do.

MR. LIEBIG: Okay. Thank you.

THE COURT: Thank you very much Lieutenant. You may step down.

* * * *

September 17, 1993

Testimony of Lt. Col. Raymond Lauer

[166] Q Colonel Lauer, in respect to the overtime pay for flood duty, for flood overtime, you received some personally?

A Yes sir I did. Yes sir.

Q And I assume, Lieutenants, Captains, received some?

A Yes sir.

Q And Sergeants also?

A Yes sir.

Q And did the Sergeants get it based upon the number of hours overtime they worked?

A It was based on the number of hours past eight that they worked.

Q The number of overtime hours that they worked?

A Yes sir.

Q And at the time this decision was made, and at the time the Department agreed to pay that overtime, there was no fund from which it could come, other than the general revenues of the St. Louis Metropolitan Police Department, isn't that correct?

A Yes sir, that's my understanding.

Q And so the St. Louis Metropolitan Police Department agreed, out of their revenue, nobody else's, to pay overtime?

A They did, right. Their flood emergency had been declared, but I understand,—I'm not certain how the payments were made, but it's my understanding that it was.

* * * *

September 17, 1993

The Court

[196] MR. RENICK: Alright. The other issue is, before I rest, we need to clarify the Court's ruling on the salary basis test, because I want to make sure that we have an agreement that all Plaintiffs, if they're similarly situated, that's it's been argued or bound by the previous ruling, and clarify that ruling.

THE COURT: You mean the Lieutenant Indelicato matter?

MR. RENICK: Right.

MS. RONZIO: Right.

THE COURT: I don't think there's any question in my mind, that ruling shall remain the same. I've not been impressed with the arguments that there's any distinction.

MR. LIEBIG: Your Honor,—

THE COURT: But I'll do this,—

MR. LIEBIG: —if that's the case, just to point out,—

THE COURT: —well I'll do this, since you haven't presented your case, I'll give an opportunity to present your arguments at the time, but I tell you now, I see no persuasive argument that we should make a change in the [197] Lieutenants.

MR. LIEBIG: Your Honor, that's not,—oh, the change in the Lieutenants, because you've already ruled that they're non-salaried,—

THE COURT: That's correct.

MR. LIEBIG: —we have no problem with that. I thought what Mr. Renick was arguing, is that that ruling also made a ruling with regard to the Sergeants, but all of them were salaried and not hourly, and that that was settled. And if that,—I think it's quite clear if you read the ruling, it doesn't say that, so that one, we don't think you should rule that, at least until you hear our evidence, but certainly if you intend to rule that, I think it's quite clear, and obviously your Honor could read it, or someone else could read it, but we ought to make that clear, because it certainly doesn't say that in the ruling.

THE COURT: Well I didn't think we were talking about that. If that's what you're talking about, I'll give you,—I won't rule on it until I've heard your side of the argument. I think the cases are clear though, that these things are not,—these are not guidelines that are set in concrete, these are characteristics, these are indications, indica if you will, as to whether a person is exempt or not. I don't think I have any ruling that says "If a person is paid extra money, that automatically means that they are [198] exempt or not exempt." I don't think,—I haven't read any case that says that. All I've said, all the District Judges that ruled before me have said, "An indication

of exemption is so and so," or "An indication of this, is so and so," that's all they've said, these are characteristics. Each case is individual, for example, Police Departments,—this is I think, a quasi-military organization, but there's all kinds of quasi-military organizations, and they don't all fall in the same category, and they don't all have the same rules. The rules that the Police Department follow here, are not the rules that I remember from World War II days, in the Army and the Air Force. So I don't know whether we've got a clear cut case that says every Police Department must follow the rules as drafted. Each one of these are different, that's why I asked the Chief if he knew what happened in Kansas City, because St. Louis and Kansas City are the two largest Police Departments in the State here. And there's any number of other Missouri Departments, much smaller in nature, that have varying degrees of quasi-military operations. So I'm going to go on the assumption, I'll tell you now, unless somebody can show me differently, and you'll have to show me, because I don't believe it's true, that I have not read any case in the Eighth Circuit or any other places that says, "These are the rules that always apply." These are rules that may apply, these are characteristics, these [199] are examples of one condition or another. And so each one has to be examined in it's totality, and we can't arrive at any general answers that applies to every one of these Police Departments. Okay, if that be true,—

* * * *

TRIAL TRANSCRIPT VOLUME IV

September 20, 1993

Testimony of Sgt. Dana Sanders

[57] Q Okay. Do you know if your,—would your currently, now, the job you're in now, are you subject to being disciplined for infractions of the manual, such as insubordination, in which you could lose pay?

A Yes sir.

Q And if a pay period could you be suspended for a day?

A Yes sir.

Q And if you were suspended for a day, then your pay check for that period would be reduced,—

A Yes sir.

* * * *

[59] BY MR. RENICK:

Q Sergeant you've never been disciplined, have you?

A Yes sir I have .

Q As a Sergeant?

A No sir.

Q You've never been suspended as a Sergeant?

A No sir.

Q Never suffered any loss of pay as a Sergeant, because you didn't work any certain number of hours?

A No sir I have not.

* * * *

September 20, 1993

Testimony of Sgt. Michael Frederick

[95] Q Okay. Do you have any authority to reduce the pay of the men you supervise?

A No sir.

Q Can their pay be reduced for violations of the rules and regulations of the Department?

A Yes it can.

Q Can they be suspended without pay?
A Yes they can.
Q Can they be suspended without pay for periods of less than a week, like for a day?
A Yes sir.
Q Can Sergeants be suspended without pay for a period of less than a week? For a day?
A Yes sir.
[96] Q For disciplinary infractions?
A Yes sir.
Q Have you ever been disciplined as a Sergeant?
A No sir.
Q Do you know of any Sergeants who have been disciplined and suspended?
A Yes sir.
MR. RENICK: Objection, it's hearsay.
THE COURT: He's answered, he doesn't know any.
MR. LIEBIG: He answered that he did, but the,—
THE COURT: Oh, did you say you did?
THE WITNESS: Yeah I do.
MR. LIEBIG: But there was an objection,—
THE COURT: What's your objection then counsel?
MR. RENICK: The objection is hearsay as to what might have happened to some other Sergeant.
THE COURT: Well, not the fact that he's heard, I thought he said no.
MR. LIEBIG: It's not proven yet,—
THE COURT: Alright.
MR. LIEBIG: —but for what it's worth, there's no jury, we'll go on I understand the point.

* * * *

TRIAL TRANSCRIPT VOLUME V

September 21, 1993

Testimony of Sgt. Michael Guzy

[65] Q Do you on occasion in a twenty-eight day period work more than one hundred and seventy-one hours?
A Yes sir.
Q And when you do, do you receive overtime pay?
A No sir.
Q Do any Sergeants receive overtime pay that you know [66] about?
A In the St Louis Police Department, I know that the Sergeants that are detached to the Federal task force receive overtime compensation. I know Sergeants in Kansas City receive time and a half or comp time at their discretion for their overtime.

* * * *

[69] Q Yes sir. Let me show you what we've marked as Defendant's Exhibit II and ask you to look at page 63 here, "Violation of Department Residence Policy", what does it [70] show as the penalty?
A Dismissal.
Q Alright, so that has been changed since the time that you were suspended, correct?
A The penalty has, yes.
Q And when you said you agreed to the, to be suspended without pay for two days, what does that mean?
A I was told that if I didn't accept the two day suspension, I would face dismissal .and rather than risk my career, I took the two day suspension. It is my belief that I was in compliance with this rule and it has always been my contention that I was.
Q You had a right to a Board hearing, of course?
A Yes I did.

Q Correct, and you chose not to exercise that right?
A On the advice of counsel, I took the two days suspension.

* * * *

[87] Q The, you were suspended earlier for a violation of the manual that has since been revised to provide for a different penalties, but am I right in understanding that you're subject to, in the manual, the disciplinary code. You're completely subject to the discipline in code and you could be disciplined for any of the things listed there?
A Yes sir.
Q And in 1990 there was actually a period, a work period in which you received a two day suspension and lost pay as a result of those disciplinary actions, correct?
A Yes sir.

* * * *

[91] Q Okay, now, let's clear up this one thing. You accepted a two day suspension because you didn't want to risk getting fired, correct?
A That's correct.

* * * *

September 21, 1993

Sergeant Charles Metzner

* * * *

[130] When did you become a Sergeant, Sergeant Metzner?
A July 2, 1978.
Q Okay. Do you recall sometime since 1978 that,— at [131] that time, were you getting paid time and a half?
A I believe we were, sir.
Q When you worked overtime?
A Yes sir.
Q And then at some point in time there was a change in that procedure?
A Yes sir.
Q Do you remember when that was?
A Not off hand. It was shortly after that.

Q Early, was it around 1980?
A I would think so. I guess I was a Sergeant about a year when that went into effect.
Q And you understood at that time that the department had determined that Sergeants would be paid strictly on a salary basis?
A If I recall, we were originally paid eight percent of our salary in lieu of being paid overtime. We got an extra eight percent on top of our, what the State Legislature set down.
Q At the point in time when the department changed you from being eligible for overtime, they gave you an eight percent increase in your salary to account for the change, correct?
A They gave us eight percent to cover the overtime that we worked which was added to our base salary. It wasn't [132] it didn't accrue into our pension as no overtime does in our department. But this eight percent didn't accrue into our pension system so it was in lieu of however many hours of overtime you worked. They gave you an extra eight percent.
Q So they increased your salary by eight percent and each year, that eight percent has stayed in your salary so that when you got wage increases,—
THE WITNESS: Our,—
MR. RENICK: Let me finish the question.
THE WITNESS: Okay.

BY MR. RENICK:

Q When you got wage increases, it was, that eight percent was built in, wasn't it?
A At one particular time, I'm not sure I understand your question but I'll try and answer it. We got X amount of dollars as our salary. The department for a period of time, now, I can't remember exactly how long, gave us Sergeants, I believe Lieutenants, Captains, et cetera, eight percent over and above their salary. I mean, our salary was X and we got eight percent of that X in lieu of working however many hours overtime. Later on the depart-

ment decided that they would take that eight percent and just make it straight into our salary so that was part of our salary.

[133] And it's been that way ever since?

A Yes sir.

Q So that when you get a raise, that eight percent continues to compound? I mean, the raise is given on your salary plus that eight percent, right?

A Well, we don't have that eight percent anymore.

Q You don't have it, where did it go?

A It was, I mean, as overtime, it was acclimated into our salary.

Q Okay. Well, you're still getting it then, aren't you?

A Yes.

Q Okay. And you understood that as a result of that eight percent, you weren't going to be paid time and a half like a police officer anymore?

A I didn't understand it but, yeah, that's what they told us.

Q Now you understand it.

A I understand that they told us that we weren't eligible for overtime.

Q And you understand now that you're paid a salary and that compensates you for however many hours you have to work?

A According to the police department, yes sir.

* * * *

[138] EXAMINATION BY THE COURT

THE COURT: I'm curious about this eight percent, the history of the eight percent. I've heard about this during the time before we began the trial of the case but there's confusion in my mind about it. Let me go back [139] a little bit. How long have you been on the police department?

THE WITNESS: Over twenty-two years, sir.

THE COURT: And during the twenty-two years ago would be somewhere in the neighborhood of '62, '63, something like that?

THE WITNESS: No, sir I joined,—

THE COURT: '72, '73, I'm sorry.

THE WITNESS: Joined in 1971.

THE COURT: Okay. That was the time when I was a State Judge and I left the State so that's why I'm a dinosaur and I remember these things. At the time that I was in the State Court, my understanding was that officers were not given either, any overtime pay at all, not palrolmen, not Sergeants.

THE WITNESS: Correct.

THE COURT: They were given compensatory time.

THE WITNESS: Compensatory, yes sir.

THE COURT: And I assume that's the policy still, until this case came along, I assumed that policy was still in existence. But that policy is no longer in existence, —

THE WITNESS: No sir.

THE COURT: —for the detectives. How long have they, the patrolmen been receiving overtime pay? [140] Approximately?

THE WITNESS: I think it was either 1977 or 1978. I was back at that particular time, I was in Homicide and I recall being paid overtime.

THE COURT: Alright. The Sergeants and those above the Sergeant rank did not receive any overtime then?

THE WITNES: Originally Sergeants received overtime pay.

THE COURT: Oh, there was a time when they did?

THE WITNESS: Yes sir.

THE COURT: And how long did that last approximately? Just a year or two before this eight percent began?

THE WITNESS: I think it was shortly after I was promoted.

THE COURT: Which was,—?

THE WITNESS: In 1978, July.

THE COURT: Alright.

THE WITNESS: I think it was shortly after that when they stopped paying overtime to Sergeants.

THE COURT: And that's when they started the eight percent which was to compensate for the overtime for the Sergeants.

THE WITNESS: Sergeants and above.

THE COURT: And above?

[141] THE WITNESS: Yes sir.

THE WITNESS: So that all of the rank, all of the commissioned officer, those above the rank of Sergeant,—

THE WITNESS: I think except for the Chief.

THE COURT: Except for the Chief, and then what you said was, that eight percent was not counted against your, was not counted in favor of your retirement benefits and so on,—

THE WITNESS: Yes sir.

THE COURT: But it was just an eight percent added on?

THE WITNESS: Yes sir.

THE COURT: Then later on that eight percent was folded into the salary so that for example, if you were getting thirty thousand dollars ($30,000.00) a year plus eight percent, they'd add the eight percent and it would be counted for your retirement.

THE WITNESS: They just,—if I recall correctly and this was quite a few years ago, they folded it in saying that we weren't going to be paid overtime anymore.

THE COURT: Alright.

THE WITNESS: But since it was already,—

THE COURT: A part of your salary.

THE WITNESS: A part of it, yeah, that they would keep it in there.

[142] THE COURT: They'd keep it going. But that then, entitled you to increase your pension because this

eight percent would now be counted as part of your salary and you'd pay the pension based on how much you make, I suppose?

THE WITNESS: Yeah, based on a three year average.

THE COURT: Alright. And then 1984, '85 comes along and the good Federal Government comes in with their *Fair Labor Standards Act* and does something that changes things around and now they include public agencies as well as private agencies in their ruling. That's basically what I think happened?

THE WITNESS: Yes sir.

THE COURT: Alright. Then these suits were filed because there was a change in the Federal Law according to what you and your fellow Plaintiffs believe and that you now think that the Federal Law provides you the opportunity to ask for overtime pay along with the detectives and the patrolmen?

THE COURT: Yes sir. That's all I'm going to say. Do you want to clear up anything? Go ahead.

MR. LIEBIG: No we have nothing further.

* * * *

September 21, 1993

The Court

[158] * * * Now, what I've come to the conclusion now and educate me, both if you can, is that all the Eighth Circuit cases are saying and all the other cases that I've read are saying is, these are characteristics which can help the finder of facts make a determination as to whether these employees are exempt or not. They're not automatic that if one thing or the other is true, that automatically puts you in one class or another. There are some cases that say, "If you get any extra money, you're in one class." There are some cases that say, "If you can't be disciplined and you can't be suspended for a day or two, that puts you in one class." Those are as I read the cases, simply characteristics of what are qualifications or characteristics of exempt and non-exempt employ-

ees, but none of them are so sacrosanct that if you have any one [159] them or any two of them or even three or four of them, that you're automatically in one class or the other. As I see it, I've got to make a decision on the facts. Each case is separate and this is unique from all other cases so, the fact that Kansas City may pay their Sergeants and St. Louis County may pay their Sergeants, does not mean that St. Louis must pay their Sergeants. This is, I frankly think that the *Fair Labor Standards Act* was designed not for these kinds of groups, but for groups in which there are large numbers of very weak, unpopular, uneducated people who could be abused very easily, so the immigrants and the racial minorities and people like that, that they had to look out for, the cooks, the stable workers, people that had the lowest job, that had no influence at all, they had to be protected with some kind of a Federal cover. Whether it should be extended now to all of these groups, including police departments, I'm not certain. Again, educate me, and if you can show me that they clearly should apply, then I want to know that but I don't see that clearly. I see cases holding that way but I see cases holding the other way. So in summary, what I'm telling all of you now is, obviously, I have not made up my mind about the case. I've played the ping-pong role here. The balls have bounced back and forth and so has my mind, so I have not decided on the case in any way.

* * * *

September 21, 1993

The Court

[168] MR. RENICK: And I want to for the record, I also want to file a motion dismiss for lack of jurisdiction.

THE COURT: Alright.

MR. RENICK: To preserve our argument that the *San Antonio Decision* is wrong.

THE COURT: Alright.

MR. RENICK: That this is the extension, as the Court has noted, of the *FLSA* to the governmental agencies, particularly in this case, has caused significant problems and we believe it's unconstitutional. We recognize that the Supreme Court has held otherwise,—

THE COURT: Yes.

MR. RENICK: —but they have previously changed their mind. If they change their mind again, we want to preserve the right to make this argument.

THE COURT: You have the right to do that.

MR. RENICK: If we go to the Eighth Circuit or before the Supreme Court.

THE COURT: You have a right to do that and there might be some distinction too, between those cases but I'll allow you to file that.

MR. LIEBIG: Just for now, because of the short [169] briefing schedule and to get the tapes over with, I would ask that we deal with his motion to dismiss, in other words, to overrule the Supreme Court ruling under the *Fair Labor Standards Act* right now, I'll make my argument right now that the Supreme Court's already ruled on that. We don't need to rethink.

THE COURT: I do. It's denied at this time. That gives him the right to preserve his record. You have something else. Okay, come right here. No closing remarks. Go ahead, I'm sorry.

* * * *

Tues 12/10 #2

(24)

No. 95-897

Supreme Court, U.S.
FILED
AUG 28 1996
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

FRANCIS BERNARD AUER, *et al.*,
Petitioners,

v.

DAVID A. ROBBINS, *et al.*,
Respondents.

On Writ of *Certiorari* to the United States Court of Appeals for the Eighth Circuit

---

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QUESTIONS PRESENTED

The Fair Labor Standards Act, 29 U.S.C. § 201, *et seq.*, ("FLSA"), sets a maximum hours standard for law enforcement at 171 hours in a 28 day period, 29 U.S.C. § 207(k). The Secretary of Labor defines and delimits FLSA "white collar" exemptions, 29 U.S.C. § 213(a)(1), so as to require compensation on a salary basis, 29 C.F.R. § 541.5d and 118(a).* The questions presented involve the application of the salary basis test in public employment, specifically—

1. Are all public employees, who *as a practical matter* are subject to non-safety disciplinary suspension for less than a full pay period, non-exempt, or are only those who actually suffer deductions non-exempt? and

2. Is a "window of correction" open to a public agency which simply amends one impermissible provision in a disciplinary code without (a) proving inadvertence, (b) revoking all impermissible authorization of deductions, and (c) restoring the lost compensation immediately upon discovery?

---

* In 1974, the FLSA maximum hours standard was extended beyond the general 40 hour week by Congress to meet the special hours of work needs of law enforcement. In 1985 after this Court's decision in *Garcia v. San Antonio Transit*, 469 U.S. 528 (1985), which overruled *National League of Cities v. Usery*, 426 U.S. 833 (1976), and restored an hours of work standard to state and local public safety agencies, Congress and the DOL further adjusted the public sector rules to allow compensatory time, to provide a protected compliance period, and otherwise to accommodate the public sector. *See* the FLSA Amendments of 1985, P.L. 99-150, 99 Stat. 790 (1985); and DOL's public sector rules, 52 Fed. Reg. 2032 (1987), 29 C.F.R. Part 553. Finally, in 1992, the salary basis test was tailored to "principles of public accountability" by a "special provision applicable to employees of public agencies." 57 Fed. Reg. 37666 (1992), Pet. App. at 184a; 29 C.F.R. § 541.5d.

PARTIES TO THE PROCEEDINGS BELOW

The Plaintiffs in the District Court include Francis Auer, Christopher Day and James Hill, all sergeants in the St. Louis Police Department, and 286 additional similarly situated Plaintiffs, including one lieutenant, Manuel Delgado, who are listed in the footnote which follows. All of the Plaintiffs were Appellants/Cross Ap-

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** Francis Bernard Auer; Christopher James Day; James Gilbert Hall; Francis B. Corona; Anthony Pona; Michael T. Indelicato; Richard Buehler; James E. Long; Roy Burgdorf; Donald Swanson; Lionel Abernathy; Kenneth Ackerman; Alfred Adkins; Duane Alexander; Steve W. Alsup; Roger Amelung; James Anderson; Michael Anderson; Edward L. Atherton; Roosevelt Barnes, Jr,; Vernon Barton; Richard C. Bartram; Lee Bates; Darrel Battle; Robert D. Bayless; Michael Beck; Dennis Becker; Joseph D. Beffa; Chris Beffa; Michael Bergman; John Billings; Michael Blanks; Leonard Bober; Donald L. Bohnert; Robert L. Bonzon; Frank Booker; Fred Boyd; Kenneth M. Bradshaw; Robert Brennan; Joseph Burgoon; John M. Burke; Thomas Burke; Jay Burkhard; Shadrach J. Burks; Al Carter; Michael Caruso; Salvatore Chrum; Earl Cobb; Walter Collier; Donald Columbo; Clarence Contestabile; Phillip P. Cornish; Don Cumings; Stanley Cunningham; Gordon Curd; Thomas J. Daley; Jerome Dampier; Robert Davis; Steve Debisschop; Robert Decker; Manuel Delgado; Edward S. Dickerson; Leman Dobbins; Jerry Dodson; James M. Doggendorf; Stephen Dougherty; Robert Downey; Robert J. Duffin; Daniel Duffy; Judith Dupius; Jimmie Lee Eads; Donald Ebner; Thomas Eckhard; Carl Edwards; Robert E. Farrell; Lawrence Flowers; Jackie Fowler; Leonard G. Forsting; Lynn D. Fox; Tommy Franklin; Michael Frederick; Nick Frederickson; Donald M. Frentzel; Bob Gavin; Robert George; Raymond L. Ghrist; Wilkie Glasener; James Glasscock; Thomas Godfrey; William Gooden; Joel Grant; Edward V. Graves; Darla Gray; Jesse Green; John D. Green; Robert C. Griffin, III; Ward Griggs; Wilburn Grove; Mike Guzy; Dennis Hahn; Kenneth Hahn; Arthur Hammer; Adolphus Hardy, Jr.; Donald Hardy; Steven Harmon; Ralph Harper; Edward Harper; Peggy Harris; Reggie Harris; Henry G. Harris; Gregory Hawkins; Mark Helmholt; Donald Henderson; Ronald Henderson; Leo Hertling; Stephen Hobbs; Susan Hobbs; Joseph Hoeing; Andrew Hollins; Jack W. Huelsmann; Jack Huesgen; Lloyd Huggans; Riley L. Hughes, Jr.; Edmund Ronald Jablonski; Michael Jarvis; Roy Joachimstaler; Cletus Johnson; Joe W. Johnson; John Johnson; Michael Jones; Milton Jones; Richard

pellees before the United States Court of Appeals for the Eighth Circuit. The Defendants and Appellees/Cross Appellants included David Robbins, Member of the St. Louis

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Jones; Robert W. Jones; Rochelle Jones; Terry Kaelin; David E. Kassebaum; John Kavadas; Elmer Kavanaugh; Kenneth Kegel; Guinn Kelly; Genevieve Kelly; David Keough; Ronald R. Klein; Ronald Klier; Robert Klinger; Jerome Klipfel; Howard Klocke; Rodger G. Kohler; Gus Kolilis; Jeffrey Kowalski; Judith A. Kramer; Joseph Kriska; Robert Kruger; John P. Kuelker; Gary Kukla; Edward Kuntz; William Kusmec; Norman Land; William Landrum; Michael L. Lauer; Thomas Leassner; Frank Lebeau; Audrey L. Lee; Leo Lewis; Joseph Lievin, Jr.; Larry Dean Liggett; J.W. Loftin; Jim E. Long; Jim H. Long; Edward Longinetti; Donna Love; Dave Lowell; Michael Lowry; Edward Lynch; Anthonette Madison; Edward Magee; Thomas J. Magnan; Warren Malugen; Joseph Marcinkiewicz, Jr.; Charles Marvin; Philip F. Maugeri; Clyde McCandless; Michael McCraw; William McCuller; Joseph McCulloch; Joe McDermott; Tim McDonough; George McDonough; Timothy McEntee; John McKenzie; Edward Messmer; Charles Metzner; Stanley Mierzejewski; Eugene Milne; Preston Moore; Richard Moore; James Moran; John J. Moriarty; Pat Morici; Bert Morris; Marlin Mueller; Gerard D. Murphy; Timothy Murphy; Joseph Murphy; Francis J. Meyers; Albert Napier; Paul Neudecker; Worthy Newsom; Daniel Nichols; John R. Nieman; Tom Niemeyer; Beverly Noble-Barnes; Leroy Nunally; Lawrence O'Toole; Dennis Oberdieck; Steve Olish; Ron Owensby; John Page; Manson Parks; Robert Piekutowski; John P. Podolak; Gary Poelling; Dennis Pollihan; William Priest; Joseph Priest; Billy Qualls; Dan Rechtien; Abraham Reddick; Joe Reynolds; Anthony Rice; Jack Eugene Richards; Larry Richards; Jacob D. Richardson; Herbert L. Riley; James Riordan; Simon J. Risk; Louis Rizzuti; Joseph Robinson; Michael T. Roe; Thomas L. Roth; John Roussin; Arthur Ruehl; Anthony Russo; Daniel Saitz; John Salamone; Thomas L. Saliba; Ronald Sanneman; Dana Saunders; John L. Saylor, Jr.; Charles Schaeffer; Robert Scheetz, Jr.; Jon S. Schickedanz; Gary A. Schubert; Timm Seithel; Raymond Sheehan; Michael Siemers; Samuel J. Simon; Daniel G. Simpher; Richard Simpher; Joseph B. Sims; Terrance Sloan; Russell F. Smith; Eugene Smith; Gwen Spicer; Charles Steele; Vincent R. Stehlin; Paul E. Steinart; William Stevenson, Jr.; Daniel C. Stewart; Paul Stewart; James J. Stika; Donald Storie; Richard Suzy, William G. Swiderski; Gregory Tayborn; John Taylor; Fred Turner; Herman Ubben; George Venegoni; Michael Vierling; Donald

Board of Police Commissioners and its acting President and the other members of that Board—Rita M. Kropf, James F. Conway, Charles Mischeaux, and Freeman Bosley, or their predecessors on the St. Louis Board of Police Commissioners.

Volmert; James Walker; James Walsh; John Walsh; Joseph E. Walsh; Russell Whitener; Dwight D. Wideman; Michael Williams; Rodney Williams; Warren Williams John G. Wondracheck; James Wurm; Robert Zambo, Jr.; Thomas E. Zipf.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS BELOW	ii
TABLE OF AUTHORITIES	vii
OPINIONS BELOW	1
JURISDICTIONAL STATEMENT	2
STATUTE AND REGULATIONS	2
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	16
ARGUMENT	18
I. THE FLSA'S GOAL OF A BROAD NATIONAL HOURS OF WORK STANDARD PRESUMES COVERAGE OF ALL EMPLOYEES AND IS SUSCEPTIBLE ONLY TO VERY LIMITED, NARROWLY CONSTRUED, STRICTLY REGULATED EXEMPTIONS	18
A. This Court Conservatively, Consistently and Narrowly Construes Efforts To Expand Exemptions	21
B. The Congress Has Historically Expanded FLSA Coverage, Is Open To Reform, But Has Been Reluctant To Broaden Exemptions	23
C. The Department of Labor Has Also Been Open to Reform While It Strictly Regulates Exemptions	28

TABLE OF CONTENTS—Continued

	Page
II. THE FLSA SALARY BASIS AND DISCIPLINARY DOCKING RULES ARE REASONABLE AND EFFECTIVE ENFORCEMENT COMPONENTS OF THE NATIONAL HOURS OF WORK STANDARD	31
A. The Salary Basis Test Is A Reasonable Exemption Standard and An Effective Enforcement Tool	31
B. The Disciplinary Docking Rule Is A Reasonable Exemption Standard and A True Measure of Salaried Status	33
III. THE EIGHTH CIRCUIT'S AMBIGUITY CONVERTS A CLEAR, OBJECTIVE, ENFORCEABLE RULE TO ONE WHICH IS UNCLEAR AND UNENFORCEABLE	36
IV. ALL PUBLIC EMPLOYEES WHO *AS A PRACTICAL MATTER* ARE SUBJECT TO IMPERMISSIBLE DISCIPLINARY SUSPENSIONS UNDER 29 C.F.R. § 541.5(d) AND § 541.118(a)(5) ARE COVERED BY THE NATIONAL HOURS OF WORK STANDARD	38
V. THE "WINDOW OF CORRECTION" UNDER 29 C.F.R. § 541.118(a)(6) IS AVAILABLE TO CORRECT IMPERMISSIBLE DEDUCTIONS ONLY IN CASES OF (a) ACTUAL MISTAKE OR INADVERTENCE, (b) RESTORATION OF LOST COMPENSATION UPON DISCOVERY, AND (c) THE COMPLETE REVOCATION OF THE IMPERMISSIBLE RULES	43
CONCLUSION	45
APPENDIX A	
The Federal Register & The FLSA "Salary Basis" Test	1a
APPENDIX B	
DOL Position 1991-1996	3a

TABLE OF AUTHORITIES

CASES

	Page
Abshire v. County of Kern, 908 F.2d 483 (9th Cir. 1990), *cert. denied*, 498 U.S. 1068 (1991)	4, 39
Adkins v. Children's Hospital, 261 U.S. 252 (1923)	19
Arnold v. Ben Kanosky, Inc., 361 U.S. 388 (1960)	22
Atlanta Firefighters v. City of Atlanta, 920 F.2d 800 (11th Cir. 1991)	39
Auer v. Robbins, 65 F.3d 702 (8th Cir. 1995)	*passim*
Avery v. Talladego, 24 F.3d 1337 (11th Cir. 1994)	39
Balgowan v. New Jersey, Dept. of Transportation, slip op. 95-5276 (3d Cir. 1996), *vacated on other grounds pending reh'g.*	31, 39, 42
Brock v. Claridge Hotel and Casino, 846 F.2d 180 (3d Cir. 1988), *cert. denied*, 488 U.S. 925 (1988)	41
Carpenter v. Denver, 82 F.3d 353 (10th Cir. 1996), *cert. pending*	31, 39
Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837 (1984)	2, 17
Corning Glass Works v. Brennan, 417 U.S. 188 (1974)	23
Craig v. Far West Engineering Company Inc., 265 F.2d 251 (9th Cir.), *cert. denied*, 361 U.S. 816 (1959)	33
Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 328 (1985)	25
Hackett v. Lane County, slip op. 95-35283 (9th Cir. 1996)	31
Hawley v. Walker, 232 U.S. 718 (1914)	19
Hernandez v. Santa Anna, slip op. 93-56634 (9th Cir. 1996)	31
Holden v. Hardy, 169 U.S. 366 (1898)	19
Hunting v. Oregon, 243 U.S. 426 (1917)	19
Kinney v. District of Columbia, 994 F.2d 6 (D.C. Cir. 1993)	39
Klein v. Rush-Presbyterian-St. Luke's Medical Center, 990 F.2d 279 (7th Cir. 1993)	39, 44
Lochner v. New York, 198 U.S. 45 (1905)	19

TABLE OF AUTHORITIES—Continued

	Page
Martin v. Malcolm Pirnie, Inc., 949 F.2d 611 (2d Cir. 1991), *cert. denied*, 506 U.S. 905 (1992)	44
McDonnell v. Omaha, 999 F.2d 293 (8th Cir. 1993), *cert. denied*, 114 S. Ct. 1188 (1994)	40
McGuire v. Portland, slip op. 95-35391 (9th Cir. 1996)	31, 36
Mitchell v. Lublin, McGaughy & Associates, 358 U.S. 207 (1959)	22
Moorehead v. N.Y. ex rel. Tipaldo, 298 U.S. 238 (1936)	19
Michigan Ass'n of Government Employees v. Michigan Dep't of Corrections, 992 F.2d 82 (6th Cir. 1993)	39, 42
Muller v. Oregon, 208 U.S. 412 (1908)	19
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NLRB v. Aerospace Co. Div. of Texton, 416 U.S. 267 (1974)	17, 28
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Phillips v. Walling, 324 U.S. 490 (1945)	21
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Shockley v. Newport News, 997 F.2d 236 (4th Cir. 1991)	39
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York v. Wichita Falls, 944 F.2d 236 (5th Cir. 1991)	40
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TABLE OF AUTHORITIES—Continued

STATUTES AND REGULATIONS

	Page
28 U.S.C. § 1254(1)	2
29 U.S.C. § 203(e)	26
29 U.S.C. § 207(k)	6, 24
29 U.S.C. § 207(o)	26
29 U.S.C. § 207(p)	26
29 U.S.C. § 213(a)(1)	2, 3
29 U.S.C. § 216(b)	17
29 U.S.C. § 216(c)	17
29 U.S.C. § 217	17
29 C.F.R. § 541.1	2, 3
29 C.F.R. § 541.2	2, 3, 32
29 C.F.R. § 541.5d	*passim*
29 C.F.R. § 541.118	2, 4
29 C.F.R. § 541.118(a)(5)	*passim*
29 C.F.R. § 541.118(a)(6)	*passim*
5 Fed. Reg. 4077	3
19 Fed. Reg. 1321	28, 35
19 Fed. Reg. 4405	4, 28, 32, 35
29 Fed. Reg. 7730	3
48 Fed. Reg. 40518	6, 24
50 Fed. Reg. 47696	31
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52 Fed. Reg. 2032	4, 29
56 Fed. Reg. 45824	2, 4, 30
56 Fed. Reg. 45828	2, 4
57 Fed. Reg. 37666	3, 4, 30, 34, 35, 36, 40
57 Fed. Reg. 37674	5
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80 Stat. 83 (1966)	23
88 Stat. 58 (1974)	24
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104 Stat. 2871 (1990)	26
107 Stat. 6 (1993)	26
109 Stat. 3 (1995)	26
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TABLE OF AUTHORITIES—Continued

	Page
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REPORTS AND HEARINGS	
Stein Report (October 10, 1940)	20
Weiss Report (June 30, 1949)	21, 22, 34
Kantor Report (March 3, 1958)	32
Hearings before the Subcommittee on Labor of the Senate Committee on Labor and Human Resources, Fair Labor Standards Amendments of 1985, 99th Cong., 1st Sess. (1985)	25
Hearings before the House Labor Standards Subcommittee on H.R. 1309 (1993)	27
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TABLE OF AUTHORITIES—Continued

	Page
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

No. 95-897

FRANCIS BERNARD AUER, *et al.*,
Petitioners,

v.

DAVID A. ROBBINS, *et al.*,
Respondents.

On Writ of *Certiorari* to the United States Court of Appeals for the Eighth Circuit

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BRIEF FOR PETITIONERS

St. Louis Police sergeant Francis Auer, *et al.*, the Plaintiffs in the District Court for the Eastern District of Missouri, Eastern Division and the Appellees/Cross Appellants in the Eighth Circuit Court of Appeals, request this Court to reverse the judgment of the United States Court of Appeals for the Eighth Circuit in *Francis Bernard Auer, et al. v. David A. Robbins, et al.*, 65 F.3d 702 (8th Cir. 1995).

OPINIONS BELOW

The Court of Appeals opinion is reported at 65 F.3d 702 (8th Cir. 1995) and is reproduced as Appendix A in a separately bound Appendix to the *certiorari* petition (hereinafter "Pet. App."). (Pet. App. 1a-35a).

The District Court for the Eastern District of Missouri's memoranda and orders dated October 31, 1991, and April 22, 1994, are unreported and are reproduced as Appendices B, C, D, and E. (Pet. App. 36a-74a). The District Court's final judgment dated August 26, 1994 is unpublished and is reproduced as Appendix D. (Pet. App. 67a-68a).

JURISDICTIONAL STATEMENT

The Court of Appeals' opinion and judgment were entered on September 8, 1995. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). No petitions for rehearing or hearing *en banc* were filed. This Court granted *certiorari* on June 24, 1996.

STATUTES AND REGULATIONS

Section 213(a)(1) covering exemptions from the Fair Labor Standards Act (hereafter "FLSA"), 29 U.S.C. § 213(a)(1), is reproduced as Appendix F. (Pet. App. 75a).

The Secretary of Labor's FLSA regulations set out at 29 C.F.R. § 541.1 (the executive exemption rule), § 541.2 (the administrative exemption rule), § 541.118 (the salary basis rule), § 541.118(a)(5) (the non-safety related disciplinary pay docking rule), § 541.118(a)(6) (the "window of correction" rule), and § 541.5d (the special salary basis rule applicable to employees of public agencies) and 56 Fed. Reg. 45824 and 45828 (notices of rule making relating to 29 C.F.R. § 541.5d) are reproduced in Appendix F. (Pet. App. 76a-101a).[1] The final

[1] This Court designates as "legislative regulations" those regulations that are issued pursuant to "an express delegation of authority to [an] agency to elucidate a specific provision of [a] statute by regulations." *Chevron USA v. Natural Resources Defense Council*, 467 U.S. 837, 843-44 (1984).

The FLSA contains in 29 U.S.C. § 213(a)(1) such an express delegation to the Department of Labor to define "executive, professional and administrative employees." The regulations set forth in 29 C.F.R. § 541.1-2 and § 541.5d are clearly such legislative regulations. 29 C.F.R. Part 541A of the FLSA exemption regulations are headed "General Regulations" and are generally designated the "legislative" regulations under the Act; DOL's "interpretations" of the "general" or "legislative" regulations in 29 C.F.R. Part 541A are set forth in 29 C.F.R. Part 541B. The discussion of the "salary basis" test in § 541.118 is contained in the Code of Federal Regulations within those sections of Part 541B headed "interpretations." However, unlike some of the 541B interpretations, § 541.118 is expressly incorporated into the "legislative" regulations of 541A through § 541.5d which limits reliance on its public sector modification of the salary basis pay docking rules to a "Federal, State or local government employee who otherwise meets the requirements of § 541.118."

rule in 29 C.F.R. § 541.5d was published with DOL's comments on the salary basis test in the public sector and the disciplinary docking rule in 57 Fed. Reg. 37666 (August 19, 1992) and is reproduced in Appendix K. (Pet. App. 184a-216a).

A complete listing of relevant regulatory entries from the *Federal Register* is set forth in Appendix A to this brief.

STATEMENT OF THE CASE

The FLSA, provides a "white collar" exemption for "executive, administrative, and professional employees" "as such terms are defined and delimited from time to time by regulations of the Secretary [of Labor]." *See* FLSA § 13(a)(1), 29 U.S.C. § 213(a)(1). (Pet. App. 75a). The regulatory pre-conditions to exempt status include two tests: a duties test and a salary basis test. An employer has the burden of establishing that an employee fulfills the requirements of both the duties and the salary basis test prior to exempting that employee from the FLSA's minimum wage and overtime at time and one half rules. *See*, 29 C.F.R. § 541.1 and § 541.2.[2] (Pet. App. 76a-80a).

[2] The basic two test approach has been in place since 1940. 5 Fed. Reg. 4077 (1940), §§ 541.1(e), 2(a) and 3(b). In 1949, the DOL amended the regulations. Since that time the salary basis test has been in force. *See*, 29 Fed. Reg. 7730, 7735 (1949). In

A special rule with regard to the application of the salary test to public employees allows exempt public employees to be subject to part-day docking for absences for personal reasons of less than one day *but* disallows rules making public employees subject to non-safety related disciplinary pay docking in an FLSA pay period.[3] *See*, 29

1954, DOL published the salary basis test, including the disciplinary docking rule, 29 C.F.R. § 541.118(a)(5), in its current form. *See*, 19 Fed. Reg. 4405, 4406 (1954). Finally, effective September 18, 1991, the salary basis test was amended by adding § 541.5d with regard to public employees to provide that so long as a public employee *otherwise meets the salary basis requirements of § 541.118*, the employee would not be disqualified as exempt on the basis that the employee's pay is subject to docking for part day absences. *See*, 56 Fed. Reg. 45824 and 45828 and 57 Fed. Reg. 37666. *See*, also Appendix A.

[3] There has been a great deal of litigation about the meaning and application of the "subject to" language in 29 C.F.R. § 541.118(a). The litigation arises both under the "subject to" docking for missing part of a day for personal reasons rule, in § 541.118(a)(1)(2) and (3), and the "subject to" non-safety disciplinary pay docking for less than a full work period rule, in § 541.118(a)(5). The two situations are different in four ways.

First, the general "subject to" part day docking rules apply only to private sector employees. When the Department of Labor invited comment on all of the 29 C.F.R. Part 541 exemption rules in 1985-1986, comments were received on nearly every aspect of the rules from the "sorely out of date" salary *level* to specific exemptions in the newspaper industry. However, no controversy was raised concerning the salary basis test. *See*, 52 Fed. Reg. 2032 (1987). After aggressive private enforceemnt in the public sector generated *Abshire v. Kern County*, 908 F.2d 483 (9th Cir. 1990), *cert. denied* 498 U.S. 1068 (1991), pay docking became controversial. The "part day docking rule" became particularly controversial in the public sector. In 1992 the Department of Labor found that "principles of public accountability" justified removing the "part day/personal absences" test from the public sector and amended § 541.118(a) by adding subsection 5d. The DOL also found that the "principles of public accountability" did not apply to disciplinary docking. 57 Fed. Reg. 37666 (1992).

Second *in a practical*, sense, docking for missing part of a day for personal reasons and disciplinary docking are quite different. An employer who has a policy of letting employees absent themselves for personal business expects the policy to be used and the work place to become "flexible." An employer who adopts a disciplinary docking code, does so precisely with the hope that it will control the activities of employees and, thereby, be unnecessary to enforce.

C.F.R. § 541.5d and § 541.118(a)(5); and 57 Fed. Reg. 37673-37674. (Pet. App. F, 82a, 85a and Pet. App. K, 184a).[4]

Third, it makes some sense to ask whether rules excusing personal absences for part of a day are "mandatory" or "permissive." Obviously only a rule that *mandates* pay for such absences would protect employees. On the other hand, the same inquiry is foolish with regard to discipline. A rule that "mandates" discipline rather than one making employees "subject to" it may restrict employer discretion but it *does* not avoid making an employee's pay conditional. The very principle of the disciplinarian's power over his or her charges, which makes the disciplinary rule test a good surrogate for testing "white collar" exemptions, means that the supervisor will always have the discretion whether and what discipline to impose. It is the "subject to" rule which is intended to control employee conduct.

Fourth, a search for some evidence of *actual* deductions might make sense in the personal absence context. Every work place, every worker, experiences occasional needs to be absent for personal reason. Therefore, if no one in a work place has ever lost a penny for personal absences, an investigator might suspiciously ask if there is really a rule which limits such absences. However, the burden being on the employer, it would be equally unbelievable were the employer unable to show multiple instances of work days when employees received their full pay for very little work, that is, an employer should be made to prove the employees get a full day's pay even for a small part of a full days work. Again, on the other hand, however, the situation with regard to disciplinary docking would be wholly different. Many employees work their whole lives conscientiously adhering to the employer's work place rules precisely to avoid discipline. There is nothing odd about the worker who is subject to a strict disciplinary code walking the straight and narrow and thus avoiding discipline.

In reviewing the many decisions concerning 29 C.F.R. 541.118(a)'s salary docking rules, it is important that all of these practical matters be given attention.

[4] The DOL's publication of the final revised rule now in § 541.5d discussed commenters' suggestions that § 541.118(a)(5) be repealed

A "window of correction" rule provides that "where a deduction not permitted . . . is inadvertent, or is made for reasons other than lack of work, the exemption will not be lost *if the employer reimburses the employee for such deductions and promises to comply in the future.*" *See*, 29 C.F.R. § 541.118(a)(6). (emphasis added) (Pet. App. 82a).

The St. Louis Police Board is the employer of all of the Petitioners, for all relevant periods, as police sergeants and, in one case, as a lieutenant within the meaning of 29 U.S.C. § 203(d). (Joint Appendix at 13) (hereafter "J.A."). The Department treats the Petitioners as exempt employees under the FLSA and does not pay them time and one half compensation for any work in excess of the 29 U.S.C. § 207(k) 171 hour/28 day trigger which, in order to accommodate the special needs of law enforcement, sets the law enforcement overtime trigger 11 hours per 28 days above the general 40 hour work week. *See*, 48 Fed. Reg. 40518 (1981); and 29 C.F.R. § 553.200 to § 553.230.

The issues before the Court involve the application of the national law enforcement maximum hours of work standard, 29 U.S.C. § 207(k), and its salary basis test for exemptions from that standard, to 289 police Sergeants and Lieutenants in the St. Louis Police Department.

Procedural History. The application of the salary basis test to these petitioners involved a complicated procedural history. The complaint was filed October 25, 1988, by

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to allow non-safety related disciplinary deductions from public employees' pay. The DOL considered and rejected the suggestions. The final revisions left the salary basis test in place in the public sector although modified from the private sector rule, to allow pay docking for part day absences. The provision against non-safety disciplinary deductions in any work period in which the public employee had FLSA work time was preserved in 29 C.F.R. § 541.118(a)(5) (Pet. App. 209a-211a).

three St. Louis Police Sergeants. On January 18, 1989, eleven additional Sergeants and Lieutenant Manual Delgado were added.

The case was bifurcated for purposes of discovery and trial on February 21, 1990—creating a situation in which an initial Stage I determination of liability (whether the Police Board properly applied the DOL regulations on exemptions) would be completed before discovery on the detailed application of those rules to all plaintiffs, which would be addressed in a Stage II proceeding.

On October 30, 1991, the district court granted summary judgment concerning Lieutenant Delgado, finding that Delgado was a salaried, and not an hourly, employee, and that his duties were exempt. (Pet. App. at 68a *et seq.*). The salary basis portion of the ruling focused on the "part day docking" rule which was contemporaneously abandoned by the Department of Labor with regard to agencies in which such docking is "required." (Pet. App. 85a).[5]

The court refused summary judgement with regard to the Sergeants who were then plaintiffs without comment on the application of the salary basis test to them.

With regard to Lt. Delgado, the court focused on docking for "part of a day" without a record of actual docking and was not persuaded by plaintiffs' "first argument in this regard because this kind of activity relates to possible discipline action that could be taken if plaintiff Delgado was

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[5] Judge Cahill's ruling came immediately after the DOL's September 1991 interim revision of the applicable regulation which added 29 C.F.R. § 541.5d (56 Fed. Reg. 45824 (September, 1991), Pet. App. 86a *et seq.* *See also*, 57 Fed. Reg. 37666 (August 19, 1992)). The district court did not apply or otherwise comment on the new rule but, after expressing concern about the financial condition of the City of St. Louis and the paramilitary nature of law enforcement, applied a "part day" docking principle seemingly consistent with it. (Pet. App. at 68a-69a). *But compare* n.9, *below*.

absent without leave."[6] The court also rejected Delgado's argument that factors such as shift differential, compensatory time for overtime work and recreational days computed, for salary purposes, into hourly equivalents evidenced his hourly status. The court found that Delgado was salaried. All of this was on the basis of Plaintiff's Statement of Facts Not in Dispute (J.A. 13-15), and a record based on depositions of only the initial plaintiffs and defendants FRCP 30(b)(6) designees. (*See* J.A. at 47-63).

The case moved forward with regard to Sergeants. In April 1993, the Court ordered the addition of consenters under 29 U.S.C. § 216(b). Two hundred seventy-five additional Sergeants were added by June 1993. After a series of in-chambers arrangements supervised by Judge Cahill, discovery of representative, similarly situated plaintiffs and 30(b)(6) designees moved forward under the standing bifurcation order.

A five day Stage I bench trial to determine liability took place between September 15 and 21, 1993. The Court was clear that consideration of the salary test as it applied to the remaining plaintiffs continued under consideration. (J.A. at 67, 83 and 93).

At the beginning of the trial, Respondents' Counsel inquired as to whether the salary basis test was still in the case or whether it was resolved on the earlier motion for summary judgment. Judge Cahill reserved ruling—"Alright, we'll take it as the trial proceeds. Okay, I think that's enough." Trial Trans. I, 40-43. (J.A. at 67). At mid-trial, the issue was revisited. Trial Trans. III, 196-198, (J.A. 82-84). And, at the end of the trial Judge

[6] The court did, however, expressly find that Lieutenant Delgado was subject to the Department Manual disciplinary provision in Rule 7.0004(c)(1) which provided that he *could* be disciplined for less than a full pay period for any AWOL, even though he could not be docked pay or recorded as absent without leave for absenting himself for a part of a day. (Pet. App. at 71a).

Cahill commented on the issue again, noting he had not yet made up his mind on the salary basis test. Trial Trans. V, 158-159. (J.A. at 93-94).

The district court's final ruling on April 22, 1994, and entry of judgment on August 26, 1994, found all but two Sergeant positions to be exempt, without additional comment on the salary basis test. (Pet. App. at 67a-74a).

The case was duly appealed to the Eighth Circuit which ruled on September 8, 1995, 65 F.3d 702 (8th Cir. 1995), that all the plaintiffs' positions were exempt. (Pet. App. 1a-35a).

The Eighth Circuit applied its interpretation of the DOL's salary basis test disciplinary docking rule in the public sector under 29 C.F.R. §§ 541.5d and 118(a); discussed somewhat ambiguously whether the "subject to" deduction language in the regulation applies only where the employee's pay has actually been docked for less than a pay period for non-safety related disciplinary reasons; and opened Police Board access to the "window of correction" in 29 C.F.R. § 518.118(a)(6).

The Record Facts. All St. Louis Police Sergeants and Lieutenants are "subject to" deductions for violations of more than 40 non-safety disciplinary rules. The Manual states:

> A member of the Department [including all Sergeants and Lieutenants] shall be *subject to* disciplinary action for the violations of the rules of conduct set forth herein. (Pet. App. at 107a). (emphasis added).[7]

The Manual's disciplinary code then lists 39 violations beginning with "(a) conviction of a felony," and ending

[7] There is no need for a semantic debate concerning whether the words "subject to" applies solely to mandatory rules which use "shall" or to discretionary rules which use "may." The St. Louis disciplinary code uses neither but instead uses the actual regulatory term "subject to." *See*, n.3, *above*.

with "(mm) failure or refusal of firearm qualification," some with multiple sub-parts. (Pet. App. at 108a-113a). The Manual includes a table of penalties, which includes suspensions for less than a full work period at least eighty times. (Pet. App. 143a-149a).

An application of these rules was developed at trial. It involved Sergeant Guzy's two day suspension arising out of his 1990 violation of the Police Board's residency requirement. Guzy has not been reimbursed. The Police Board refuses such correction absent a final judicial decision that it must do so. Major portions of the disciplinary code remain. There has been no promise to revoke or reform it. Trial Trans. Vol. V, 65, 68-69, 87, 91. (J.A. at 87-88). After the Guzy docking, and wholly unrelated to this litigation, the portion of the disciplinary code which specifically applies to a residency requirement was revised in 1991 to make the sole penalty termination.[8] (Pet. App. 217a-219a).

The Police Board relies on the testimony of a single witness, the defendants' 30(b)(6) designee on record keeping, to establish that "no docking has occurred." However, here is that testimony:

[8] Note that the 1991 revision of the punishment for violating the residency requirement did not result from a promise to revise disciplinary docking as a general practice. Over eighty of the remaining proscribed penalties include docking of pay for less than a full pay period. Rather, the Police Board decided after the resolution of the Guzy case that a system requiring residency, which did not punish its violation by separation, could result in the continuing employment of officers who did not live within St. Louis.

In fact, the record in the Guzy case is not clear whether Guzy continued to maintain an apartment in St. Louis and an inherited home in St. Louis County. It is not clear that the two day suspension which was "negotiated" in Guzy's case was for violating the residency requirement or for another "lessor included" violation such as "failure to obey," Manual Provision 7.004(c), "reporting address change," Manual Provision 7.0004(k), or "discredit", Manual Provision 7.0004(jj), each of which continues to list suspension for less than a full work period as a punishment.

Q: Now, you testified that nobody—no Sergeant to your knowledge has ever been docked—

A: —That's correct—

Q: —*for less than a day*, but can they be docked for less than a day?

A: *For discipline*?

Q: For not working. Can anybody be docked for not working less than a day?

A: I can't answer that. That's—

Q: I just want to know from you, can that happen, you get an order from somebody that says dock this Sergeant three hours and don't pay him for three hours?

A: *It can happen only through disciplinary proceedings from the board of police commissioners.* I cannot have a captain call me and say dock this man three hours without documentation. We would not do that. (Cortelyou Depos., Respondents' Brief in Opp. to *Cert.*, at App. 7-8). (emphasis added)

While this is probative concerning "the part day docking" rule, which does not apply to the public sector at least after September 1991,[9] it does not establish that no one was ever disciplined for less than a full pay period for discipline. In fact, it is evidence that Sergeants are in fact subject to disciplinary docking. *No evidence supports a claim that "no one has been docked for violating*

[9] If anything, the Police Board lack of part day docking establishes that the "principles of public accountability" which generated limits on the part day docking rule applicable to public agencies are not available to the Police Board. Obviously, no "pay system established by state, ordinance, or regulations, or policy or practice established pursuant to principles of public accountability" requires special docking rules in the St. Louis Police Department. The Police Board has proven that a "part day docking" rule is neither mandatory nor, even in use in the St. Louis Police Department. In addition, the applicable pay statute sets maximums on the compensation of various law enforcement officers but also allows reduction below those maximums. (J.A. at 17 and 70).

a disciplinary rule." Nor did the employer present a single witness to testify that "no Sergeant has ever been docked," despite repeated testimony that they had the ability to check their records to determine if such a docking occurred. See *Cortelyou* Depos. (J.A. at 57).[10]

In fact, the Police Board's FRCP 30(b)(6) designee on compensation, Rosalie Cortelyou, also testified as follows:

> Q: . . . I'm interested in a situation where a Sergeant says to his Lieutenants, I want to take three hours off, and Lieutenant says, no, you can't take three hours off, I need you here. He goes home anyway.
>
> A: That would be disciplinary then.
>
> Q: But would he be docked for those three hours that he was absent without leave or absent without being excused?
>
> A: *Not at that point, no. He would have to—there would be an allegation of misconduct. He'd have to do through Internal Affairs, waivers would be signed or a board trial. Again that's disciplinary.* We would not dock him within the immediate time

[10] Q A few minutes ago you told me that you could search your records and determine if Sergeant Jones was docked two days pay, how such time Sergeant Jones had actually missed from duty to be docked that two days pay?

A That's correct.

Q And I'm not trying to confuse you. You still stick with that answer?

A Yes.

Q You would have something?

A Yes.

Q In light of not getting an AWOL report on the sergeant?

A *It would be a suspension, probably a disciplinary action from the board.*

Q Yes, but would you have a record as to how much time the sergeant had actually missed to cause that?

A Yes. If the duty roster were marked correctly, yes. (J.A. at 57). (emphasis added).

> frame, you know, within the next paycheck or anything like that. We would not take time away from him, no—dollars.
>
> Q: You would still pay him and *then he'd be disciplined later*?
>
> A: *Correct.* Cortelyou Depos. at 15; *see, also* at 33-35, 38-39 (J.A. at 49-57).[11] (emphasis added).

The Department's 30(b)(6) designee on the Department's policies generally, Chief of Police Sheetz, specifically testified that Sergeants are subject to charges and discipline under the Manual and that discipline could be imposed for matters not related to safety violations. The Chief of Police never denied that Sergeants could be suspended. Instead, he admitted he would suspend a Sergeant for unexcused absences. "I would say that he'd probably be—he could be—he could be suspended in lieu of, say, maybe one day suspension, two day suspension. . ." (J.A. at 60). When asked whether any Sergeant had been so disciplined, Chief Sheetz responded, *"I can't recall any specific case, but would say yes."* (J.A. at 62). (emphasis added).

The Police Department's designee on FLSA exemptions, Mr. Pattison testified:

> Q: . . . may the Sergeant be disciplined?
>
> A: Yes.
>
> Q: May the discipline include docking of pay?
>
> A: *The discipline could include suspension for a particular number of days, which would be loss of pay for that day.*

[11] Note that the post-1991 DOL rules which allow part day docking also allow "placing an employee on leave without pay status." 29 C.F.R. § 541.5d. Ms. Cortelyou testified that St. Louis does not place sergeants "in absent without leave status" for missing part of a day even though they would not otherwise lose available exempt status were the Police Board bound to require such docking by "principles of public accountability." Rather the Sergeants are "subject to" the more serious disciplinary suspension for less than a full pay period administered separately.

Q: So that during that pay period their pay would be reduced for that pay period by that day that they were suspended?

A: Yes. Pattison Depos. at 13-14) (J.A. 63-64) (emphasis added).

The Police Department never offered evidence, let alone proved that "no Sergeant or Lieutenant has been docked for disciplinary reasons." While the burden on the issue is on the Police Department, they did their utmost to keep the record clear of any evidence on the point. In 1993, Kurt Delabar was designated under 30(b)(6) concerning the exemption of Sergeants from FLSA. When Mr. Delabar was asked by the Sergeants' counsel "whether Sergeants are subject to payroll deductions in whole day increments as part of discipline," the Police Board counsel objected and *instructed the witness not to answer* the question.[12] *See*, Delabar Depos. at 19-20.

At trial, the *employer*'s witness, Lieutenant Scego, testified that Sergeants were subject to disciplinary docking.

Q: If, are Sergeants who work under you subject to discipline?

A: Yes.

Q: And I'm not, I realize none of these probably ever did this so hypothetically, if a Seregant were, for instance, insubordinate, they would be disciplined under general orders or a manual correct?

A: Under that scenario, yes, they could be.

Q: *And could the discipline that they receive include a suspension for a day or two? It would have to be approved through the procedures I understand.*

A: *Sure, but it could be longer than a day or two or it could be less.* Trial Trans. II, 141-142. (J.A. at 76). (emphasis added)

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[12] Judge Cahill resolved the resulting discovery dispute when he declared it moot two months after the trial on February 17, 1994.

Sergeant Dana Sanders, an Internal Affairs investigator charged with administration of the Department's disciplinary code, testified that she, as a Sergeant, was subject to disciplinary docking and that she could be suspended for a day or more. While Sergeant Sanders has been disciplined under the applicable procedures, she herself has not been disciplined while a Sergeant. Trial Trans. IV, 57 and 59. (J.A. at 85).

Precinct Sergeant Michael Frederick testified that he was subject to suspensions for a day or more under the disciplinary code; while he had never been disciplined, he testified that he knew of Sergeants who had been disciplined and suspended. Again, rather than even attempt to meet its burden on this issue, the employer attempted unsuccessfully to keep this testimony out of the record as hearsay. Trial Trans. IV, 95-96. (J.A. at 85).

Finally, Guzy, of course, testified concerning his two day suspension. He also testified that he remains subject to disciplinary suspension for any of the numerous remaining violations listed in the disciplinary code. (J.A. 87-88; Pet. App. 217a-219a).

This is the complete record concerning docking.

Judge Cahill clarified on the record that the statutory "salaries" are "maximums." Trial Trans. I, 92. J.A. at 70). These "salaries" do not prevent or otherwise impact disciplinary deductions; such deductions can bring a Sergeant's compensation below the "salary" set forth in the Missouri statute. (J.A. at 17).

Sergeants' and Lieutenants' records are kept on an hour-for-hour basis. Recreation time, vacation time, sick leave and shift assignments are recorded, credited and debited on an hourly basis. They have no discretion or control over their hours of work. *See*, Facts *Not In Dispute, Para.* 8 and 9; Cortelyou Depos. at 13, 17-18; Burgdorf Depos. at 49; Auer Depos. at 7; Day

Depos. at 5-6; Scheetz Depos. at 31-33; Pattison Depos. at 13; Plaintiffs' Answer 3 to Defendants' Second Interrogatories # 13; August 2, 1988 Memorandum from Major Walsh; and August 23, 1988 memorandum from Lt. Col. Hall. (J.A. at 3, 4, 6, 11-12, 47, 58, 60-61 and 63).

Sergeants are paid shift differentials for each hour worked on the midnight shift. (J.A. at 16); Trial Trans. II, 182. (J.A. at 77). At times they are paid compensatory time for overtime hours. They use accrued compensatory time in hourly increments. Their compensation is also converted into hourly increments. Trial Trans. II, 205-207, 230, 237-238. (J.A. at 77-78). Some Sergeants and Lieutenants receive overtime pay when working in federal crime programs. The employer's designee testified that Sgt. Conreux regularly received overtime in his day-to-day assignment. Cortelyou Depos. at 14 (J.A. at 48). While under federal authority they are treated as non-exempt for FLSA purposes. (Trial Trans. III, 32-33 (J.A. at 81). Overtime pay was paid to Sergeants during the 1993 flood of the Mississippi and Missouri Rivers and on other occasions where the funding was available from sources other than the Department. (Trial Trans. I at 130-131, 138, 143; Trial Trans. II at 141; Trial Trans. III at p. 166; Trial Trans. V, 66 (J.A. at 64, 76, 87).

SUMMARY OF ARGUMENT

The decision of the Eighth Circuit that St. Louis Police Sergeants and Lieutenants are exempt from coverage under the Fair Labor Standards Act maximum hours standard should be reversed. The Eighth Circuit misapplied the salary basis disciplinary docking rule in 29 C.F.R. §§ 541.5d and 541.118(a)(5) and the "window of correction" in 29 C.F.R. § 541.118(a)(6). Those rules are reasonable. They were developed pursuant to a Congressional directive that the Secretary of Labor "define and delimit" the breadth of FLSA "white collar" exemption.

29 U.S.C. § 213(a)(1).[13] The Department of Labor's rules are entitled to special deference.[14] This Court has held that all FLSA exemptions must be narrowly construed.

The misapplication of the Department of Labor's rules combines with the ambiguity of the decision itself to convert a clear objective, enforceable rule into one which is unclear and unenforceable.

This Court should endorse a rule that any employee who *as a practical matter* is subject to disciplinary docking for less than a full pay period is covered by the hours of work standard. Actual instances of docking are relevant, but not necessary, to application of this *as a practical matter* rule.

This Court should endorse a window of correction rule which requires all four of its traditional elements. The window is open only in cases in which an employer (1) meets, by clear and affirmative evidence, a burden to prove, (2) that any deductions were inadvertent, in the sense of mistaken or unintended, (3) that all deductions were fully rectified upon discovery, and (4) that all rules

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[13] The Secretary is, of course, the official with overall responsibility for FLSA enforcement. Under the FLSA, the Secretary is given explicit authority to "supervise the payment of unpaid . . . overtime compensation owing to any employee," and to bring civil suits to enforce § 7's overtime compensation provisions. 29 U.S.C. § 216(c). *See also* 29 U.S.C. § 217. Although employees may bring independent actions without relying on the Secretary—as petitioners have brought an independent action here—the right to bring such an action terminates if the Secretary chooses to file suit. 29 U.S.C. § 216(b). The Secretary also has the statutory responsibility under § 6 of the 1985 Public Sector FLSA Amendments to "promulgate such regulations as may be required" to implement Congress' explicit accommodation to the special needs of state and local agencies. P.L. 99-150, § 6; 99 Stat. 790.

[14] *See, NLRB v. Aerospace Co. Div. of Texton,* 416 U.S. 267, 274-275 (1974); *Chevron U.S.A. v. Natural Resources Defense Council,* 467 U.S. 837, 843-844 (1984).

or codes subjecting the employee to discipline have been completely and forever revoked.

ARGUMENT

I. THE FLSA'S GOAL OF A BROAD NATIONAL HOURS OF WORK STANDARD PRESUMES COVERAGE OF ALL EMPLOYEES AND IS SUSCEPTIBLE ONLY TO VERY LIMITED, NARROWLY CONSTRUED, STRICTLY REGULATED EXEMPTIONS.

The development of a broad, widely applicable national hours of work standard is a fundamental element of the history of American social legislation and law: the 1791 Philadelphia Carpenters strike for the ten hour day; the Jacksonian era ten hour day movement; President Van Buren's 1840 ten hour federal work day executive order; the 1850's nine hour movement; the abolitionists' hours of work reforms and the 1842 drive of female mill workers for a sensible day; Horace Greeley's post-Civil War Radical Republican program; the Catholic Labor Movement hours of work crusade; the nine hour day movement of the Progressives at the turn of the century involving the National Consumers League, Florence Kelly, Grace Abbott, and the early pre-Supreme Court work of Louis Brandeis and Felix Frankfurter; T.R. Roosevelt's Bull Moose Platform; Woodrow Wilson's W.W.I. hours standard; the 1927 N.Y. Police eight hour day order; Herbert Hoover's Platform; and 1932 Chamber of Commerce President Harriman's CBS radio plea.[15] Hours of work

[15] *See*, Roediger and Foner, *Our Own Time: A History of American Labor and the Working Day* (Greenwood Press, 1989); Hunnicutt, *Work Without End: Abandoning Shorter Hours for the Right to Work* (Temple University Press, 1988); Rosensweig, *Eight Hours for What We Will: Workers and Leisure in an Industrial City 1870-1920* (Cambridge University Press, 1983), Steinberg, *Wages and Hours: Labor Reform in the Twentieth Century* (Rutgers University Press, 1982); Cahill, *Shorter Hours: A Study Since the Civil War* (Columbia University Press, 1932); Nordland, "A Brief History of the FLSA," 39 *Labor Law Journal* 715-28 (November 1988); Hunnicutt, "Monsignor Ryan and the

questions go to the core of the work place and have reached the Court from the turn of the last century.[16] The hours of work movement prior to the Great Depression was international. As described by Louis Brandeis in the original "Brandeis Brief," filed in 1908 in *Muller v. Oregon*, 208 U.S. 412 (1908), there is a worldwide need for an hours of work standard. Brandeis made a strong public policy argument that so long as men, women [and originally children] work, pressure will be felt between the demands of the work place and the demands for a sane society, a strong community and a healthy family. See, the Brandeis Brief, its analysis in *Amicus Curiae Brief of the National Employment Law Project*, and Mason, *Brandeis: A Free Man's Life* (Viking Press, 1946), at 248-253.

The 1937 enactment of the Fair Labor Standards Act and its forty hour standard was the culmination of this movement. The Act was a compromise after the defeat of the 1935 Black-Connery "Thirty Hour Week" bill intended by its sponsors Senator Hugo Black and Congressman William Connery to cover all American employees. Its exemptions were intended to be very narrow. The narrow class of highly paid executives, top level administrators, and professionals, who in 1937, were thought to include those very few who were not truly "employees" at

Shorter Hours of Labor," 69 *Catholic Historical Review* 384-401 (July 1983); Eggert, "Fight for the Eight Hour Day," *American History Illustrated*, 36-44 (May 1972); and Appendix A Chronology to the *Amicus Curiae Brief of The National Employment Law Project.*

[16] *See*, for example, *United States v. Martin*, 94 U.S. 100 (1876); *Holden v. Hardy*, 169 U.S. 366 (1898); *Lochner v. New York*, 198 U.S. 45 (1905); *Muller v. Oregon*, 208 U.S. 412 (1908); *Hawley v. Walker*, 232 U.S. 718 (1914); *Hunting v. Oregon*, 243 U.S. 426 (1917); *Adkins v. Children's Hospital*, 261 U.S. 525 (1923); *Moorehead v. New York ex. rel Tipaldo*, 298 U.S. 238 (1936); and *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937); and Dalrymple, *Sexual Distinctions in the Law: Early Maximum Hour Decisions of the United States Supreme Court* (Garland, 1987).

all. Senator Black liked things to be as clear as possible. He wanted a bright line for employers under the Act. See, historical research in n.15, *above*. The exemption provisions designated the Secretary of Labor to "define and *delimit*" exemptions. 29 U.S.C. § 203(a)(1).

The Fair Labor Standards Act was designed by its sponsors "to expand the frontiers of social progress" by "insuring to all our able-bodied working men and women a fair day's pay for a fair day's work." Message of the President to Congress, May 24, 1937.

Almost immediately employers argued that the exemptions should be read broadly. They argued that all "white collar" workers were intended to be excluded. In 1940, the seminal report by the Wage and Hour Administrator on the Act, the "Stein Report," specifically rejected the argument put forward by the Chamber of Commerce and others that the forty hour work week should cover only workers earning approximately the minimum wage, and, concomitantly, that highly compensated employees should be exempt from the Act's hours of work standard regardless of the degree to which they lack the prestige and status associated in 1940 with the terms "executive and professional."

> Another argument frequently advanced by the proponents of a blanket exemption for white collar workers is that the maximum hours provisions of the Act are or should be applicable only to persons whose earnings approximate the minimum wage. "A ceiling for hours" is just as much an independent objective of the Act as a "floor for wages," and surely it is a serious misreading of the Act to assume that Congress meant to discourage long hours of work only where the wages paid were close to the statutory minimum. Living conditions can be improved and work spread even where wages are comparatively high. "Stein Report" (October 10, 1940), *Wage and Hour Manaual* (BNA), Cumulative Edition 1944-1945, at 679-680. (J.A. at 30-31).

A. This Court Conservatively, Consistently and Narrowly Construes Efforts To Expand Exemptions.

In every decade since the FLSA's enactment, employers have challenged the narrowly restrictive nature of its exemptions with similar arguments. In every decade they have been rebuffed.

In 1944, the question of the breadth and purpose of FLSA exemption reached this Court. In *Phillips v. Walling*, 324 U.S. 490 (1945), the Court ruled that—

> Any exemption from such humanitarian and remedial legislation must be narrowly construed, giving due regard to the plain meaning of statutory language and the intent of Congress. To extend an exemption to other than those plainly and unmistakenly within its terms and spirit is to abuse the interpretative process and to frustrate the announced will of the people. 324 U.S. at 493.

In that same year, the Tenth Circuit Court of Appeals, upheld the reasonableness of the salary basis requirement of the "white collar" exemption section of the Act. See, *Walling v. Yeakey*, 140 F.2d 830, 832-833 (10th Cir. 1944) ("[I]n most cases, salary is a pertinent criterion and we cannot say that it is irrational or unreasonable to include it in the definition and delimitation [of *bona fide* executive, administrative and professional employees.]")

The Secretary of Labor reaffirmed these principles in a 1949 report rejecting any broadening of exemption and removal of the "salary basis" test:

> Compensation on a salary basis appears to have been almost universally recognized as the only method of payment consistent with the status implied by the term "bona fide" executive. Similarly, payment on a salary (or fee) basis is one of the recognized attributes of administrative and professional employment. The proposals to eliminate the requirement and to

apply an hourly rate or average earnings test may therefore be rejected as inconsistent with true executive, administrative or professional status. "Weiss Report" at 39 (June 1949). (J.A. at 36-37).[17]

In 1950, the Court pointed out that the "breadth of coverage" of the FLSA's overtime hours rules is "vital to [its] mission: of establishing a national work week standard and that statutory exemptions of the Act should be narrowly construed. *Powell v. United States Cartridge Co.*, 399 U.S. 497, 516 (1950). In 1959, the Court stated "[FLSA] exemptions are to be narrowly construed in order to further Congress' goal of providing broad federal employment protection." *Mitchell v. Lublin, McGaughy & Associates*, 358 U.S. 207, 211 (1959).

In 1960, *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960), this Court emphasized that "exemptions are to be narrowly construed against employers seeking to assert them and their applicaton limited to those establishments plainly and unmistakenly with their terms and spirit."

By the 1970's it was clear that the presumption was that an employee is not exempt. The employer has the burden to prove by "clear and affirmative evidence" that each employee for whom an exemption is claimed is entitled to a *bona fide* exemption under the Department of

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[17] Note the Joint Appendix mistakenly dates this report as 1940, it should read 1949. The Department of Labor's "Stein Report", on October 10, 1940, also stated—

> All of the foregoing arguments have as an inarticulate major premise the assumption that all salaried white collar workers enjoy satisfactory working conditions—that they need no protection against oppressively long hours. The record shows the incorrectness of this assumption. There is evidence, some of it introduced by the proponents of the blanket exemption, that, prior to the effective date of the act, a workweek of 48 or 54 hours or even longer was common. (J.A. at 32)

Labor's regulations. Employers have the burden of proving their entitlement to any exemption. *Corning Glass Works v. Brennan*, 417 U.S. 188, 196 (1974) ("application of an exemption under the FLSA is a matter of affirmative defense on which the employer has the burden of proof.")

In 1985, the Court insisted again that the FLSA must be "consistently construe[d] liberally to apply to the furthest reaches consistent with Congressional direction . . . recognizing that broad coverage is essential to accomplish the [FLSA's] goal[s] . . ." *Tony and Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290, 296 (1985).

B. The Congress Has Historically Expanded FLSA Coverage, Is Open To Reform, But Has Been Reluctant To Broaden Exemptions.

While the Court has played a key role in the development of FLSA, Congress and the Department of Labor have been equally clear with regard to the narrow nature of exemptions. Congress and the Department have been sensitive to the need to adjust the Act to the times. They have been responsive to problems. However, they have also been reluctant to broaden exemptions from the Act recognizing that the breadth of coverage is indeed "essential to accomplish the goals of the Act."

Beginning in the 1960's, Congress has repeatedly revised the FLSA to reflect the changes which public employer and employee groups brought to the attention of Congress. In 1966, Congress amended the FLSA to apply, for the first time, to a limited number of the public sector employees. 80 Stat. 83 (1966).

In 1974, Congress passed amendments to the Act which extended its coverage to state and municipal employers as of January 1, 1975.[18] However, due to the

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[18] Congress expressly indicated an intent that the Act would be administered after 1974 "in such a manner as to insure consistency

unusual working conditions and long hours of duty of fire fighters and law enforcement employees and in order to alleviate the financial burdens that might be otherwise imposed on public employers, Congress added section 7(k) (29 U.S.C. § 207(k)) as a special overtime provision for employees in those categories. Instead of requiring overtime compensation after forty (40) hours of work in seven (7) days, Congress set a higher threshold that would, over several years, be reduced to 216 hours in a 28-day work period (or proportionally, 50 hours in seven (7) days). Alternately, if studies conducted by the United States Department of Labor showed that the hourly overtime threshold for these employees should be lower than 216 hours, then such lower hourly threshold would apply. 88 Stat. 58 (1974).

After some delay, in 1981, the Department of Labor completed its study and established the current 171 hour 28-day standard in law enforcement. 48 Fed. Reg. 40518 (1981); 29 C.F.R. §§ 553.200-230.

When Congress extended the Fair Labor Standards Act to state and local government employees in 1974, it was the intent of Congress that the same minimum wage and hour standards be applied to government that are applied to private sector employers. The 1973 Senate report leading up to the 1974 amendments states:

> The Committee recognizes and the bill reflects an awareness that to raise the minimum wage without expanding the coverage of the Act would serve to deny even the minimum benefits of the Act to large groups of workers who have been denied the protection of the Act for more than 30 years . . . Equity demands that a worker should not be asked to work

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with the meaning, scope, and applications established by rulings, regulations, interpretations, and opinions of the Secretary of Labor which are applicable in other sectors of the economy." H.R. Rep. 913, 93rd Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 2811.

> for subminimum wages in order to subsidize—his employer, whether that employer is engaged in private business or in government business. S. Rep. No. 300, 93rd Cong., 1st Sess. at 17.725. (1974).

This Court's decision in *National League of Cities v. Usery*, 426 U.S. 833 (1976), however, rendered the 1974 application in the public sector largely dormant, until 1984 when this Court decided *Garcia v. San Antonio Metropolitan Transit Auth.*, 469 U.S. 328 (1985).

After the *Garcia* decision, in 1985 many public employer groups sought Congressional relief from FLSA coverage, arguing that it would be too costly and negatively effect their function. Indeed, the first formal legislative proposal would have exempted public employers from all overtime provisions of the FLSA. S. 1570, 99th Cong., 1st Sess. (1985); *Hearings Before the Subcomm. on Labor of the Senate Comm. on Labor and Human Resources, Fair Labor Standards Amendments of 1985*, 99th Cong., 1st Sess. (1985) (Sen. Nickles). This was strongly opposed.

To avoid a legislative deadlock, Congress assisted on negotiations between public employers and public employees to create an extensive compromise. *See, e.g.*, 131 Cong. Rec. S.14047 (Sen. Nickles) (the final Senate bill "is different from the bill I originally introduced and represented a compromise among the affected parties); 131 Cong. Rec. H.9916 (Rep. Hawkins) ("bipartisan efforts" and "compromise" produced the 1984 Amendments.) The compromise bill was supported by "the U.S. Conference of Mayors, the National League of Cities, the National Conference of State Legislators, the AFL-CIO and the Fraternal Order of Police." 131 Cong. Rec. 2.14047; 131 Cong. Rec. H.9238. With such broad support, Congress quickly passed the 1985 FLSA Amendments. P.L. 99-150, 99 Stat. 790 (1985).

These 1985 Amendments added a number of provisions to the FLSA to directly accommodate the concerns which

public employers raised to Congress.[19] In particular, Congress permitted public agencies to provide compensatory time in lieu of cash for overtime pay (29 U.S.C. § 207 (o)), provided overtime exemptions for public agencies in certain situations where employees work two jobs (29 U.S.C. § 207(p)), provided public agencies with special rules for employee volunteers (29 U.S.C. § 203(c)(4)); exempt non-civil service employees of the legislative branch of state and local government. (29 U.S.C. § 203 (e)(2)(ii)(v)); and provided public employers with a one year retroactive "grace period" in which to come into full compliance with this Act. 99 Stat. 790 (1985). The legislation did not change the exemption provisions at issue here.

Since 1985, Congress has remained attentive to the concerns raised by employer groups, amending the FLSA as necessary. Specifically, in 1990, Congress directed the Secretary of Labor to revise the regulations so that certain employees in the computer field would not need to be paid on a "salary basis" provided their hourly rate of pay is at least 6 and ½ times the minimum wage. P.L. 101-583, 104 Stat. 2871 (Nov. 15, 1990). Similarly, in 1993, Congress provided that the fact that an employee takes unpaid leaves of absence under the Family and Medical Leave Act would not defeat the "salary basis" test for an otherwise exempt employee. P.L. 103-3, 107 Stat. 6 (February 5, 1993). The first enactment of the 104th Congress, the Congressional Accountability Act of 1995 (P.L. No. 104-1, 109 Stat. 3), applied the FLSA and its exemptions and the salary basis test to Congressional employees.[20] In 1995, Congress also enacted a special

[19] *See* H.R. Rep. No. 99-331, 99th Cong., 1st Sess. 17 (1985) (Congress recognized that it was "essential that the particular needs and circumstances of the states and their political subdivisions be carefully weighed and accomodated" by the political/legislative process designed for that purpose).

[20] *See*, CRS, *Report for Congress*, 95-557A (May 2, 1995) and Cong. Office of Compliance Regulations, 141 Cong. Rec. S. 17613 (November 28, 1995).

exemption from the strict overtime requirements for public sector court reporters permitting them to continue to receive a per page transcribing fee, in certain circumstances, and excluded that fee from the regular rate of pay for overtime purposes. P.L. 104-26, 109 Stat. 264 (September 6, 1995)

At the same time, Congress has specifically considered, and refused other requests. At least six times between 1991 and 1996, members of Congress have submitted bills on behalf of public employers to broaden the "white collar" exemptions or to remove the salary basis test within the public sector.[21] Congress has held no less than six hearings on the FLSA application since 1991, often taking testimony from public employers.[22] Congress has con-

[21] *1991:* S. 1670, 102d Cong., 1st Sess. (July 1991) (a bill to remove the salary basis test from the public sector after the Ninth Circuit's *Abshire* ruling); *1992:* S. 3089, 102d Cong., 2d Sess. (July 1992) (a bill to broaden the "white collar" exemptions by removing the salary basis requirement in the public sector); *1993:* H.R. 1309, 103d Cong., 1st Sess. (March 1993) (A bill to broaden the "white collar" exemptions to permit otherwise exempt employees to be subject to part day docking); S. 1354 103d Cong., 1st Sess. (August 1993) (A bill to broaden the "white collar" exemptions to permit part-day deductions, disciplinary deductions, strict accounting of hours of work and to subject the employee to specific hours of work for an otherwise exempt employee); *1995:* H.R. 946, 104th Cong., 1st Sess. (February 1995) (A bill to broaden the "white collar" exemptions to permit certain deductions in pay from an otherwise exempt public employee); H.R. 2723, 104th Cong., 1st Sess. (December 1995) (A bill to broaden the "white collar" exemptions to permit certain deductions from pay for otherwise exempt employees).

[22] *1991:* Cong. Rec. S-12,253 (1991) records hearings held on bill S. 1670 to remove the salary basis test from the public sector; *1992:* Cong. Rec. H-341-4 (1992) records hearings on the salary basis test in the public sector; *1993:* Hearings were also held in the Spring 1993 on bill H.R. 1309 broadening white collar exemptions before the House labor Standards Subcommittee; *1995:* Hearings before the House Sub-Committee on Workforce Protection (June 1995) Hearings on H.R. 2391 (November 1995) before the

sistently to date refused to broaden the exemption or revise the salary basis test. Congress's reluctance to amend the Act to overrule the Department of Labor's longstanding interpretation of the salary basis test and its disciplinary docking rules is "persuasive evidence that the interpretation is the one intended by Congress." *North Haven Bd. of Education v. Bell*, 456 U.S. 512, 535 (1982); *NLRB v. Aerospace Co. Div. of Textron*, 416 U.S. 267, 274-75 (1974).[23]

C. The Department of Labor Has Also Been Open While It Strictly Regulates Exemptions.

The Department of Labor has been equally active in revising the FLSA regulations to accommodate the needs of public employers as the evidence is presented that they need revision.

In 1954, the DOL issued a Notice of Proposed Rule Making on the salary basis test. The Notice included, for the first time, the language regarding the disciplinary deduction rule of 29 C.F.R. § 541.118(a)(5). The proposed disciplinary docking rule recommended that "penalties imposed for infractions of safety rules *or for other major disciplinary reasons* will not affect salaried status." 19 Fed. Reg. 1321 (1954) (emphasis added). However, after receiving comments on the proposed salary basis test, the DOL declared "on the basis of the comments, the provision that penalties may be imposed for major disciplinary reasons has been deleted, and the provision governing safety rules has been clarified." 19 Fed. Reg. 4405 (1954). Thus, DOL revised the disciplinary docking rule to the current language. 19 Fed. Reg. 1321 and 4405 (1954). The Secretary of Labor was active in the negotiations and hearings on Capitol hill surrounding the 1985 Amendments. In addition, the Secretary agreed not to enforce the *Garcia* decision until Congress had an opportunity to review and decide whether to revise the FLSA.

Immediately following the passage of the 1985 Amendments, the DOL held a series of meetings with representatives of public employers and public employee organizations to discuss the issuance of proposed regulations addressing the Amendments. 51 Fed. Reg. 13402 (April 18, 1986). After the Secretary received extensive comments from public employers and public employee organizations, the final rule was issued. 52 Fed. Reg. 2012 (January 16, 1987).

Shortly after the 1985 Amendments became effective, the DOL received a comment from a public employer who claimed that their state constitution prohibited them from paying any public employee for a whole day if he or she did not work the whole day. As a result of this comment, the DOL issued a "non-enforcement" policy. It declared that it would not enforce the part-day docking portion of the salary basis test against any public sector employee *who otherwise met the requirements for exempt status*, provided the applicable state or local law required the employer to deduct pay for absences of *less than a day* for public accountability reasons. *See*, DOL Opinion Letter Ruling of January 9, 1987.

As a result of the Ninth Circuit's *Abshire* decision, the DOL opened another comment period to determine whether changes needed to be made to the salary basis test in the public sector. The DOL received 199 comments from public employers and 25 from public em-

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House Sub-Committee on Workforce Protection of the Committee on Economic and Educational Opportunities.

[23] Additional activity is anticipated by both the Senate Labor Committee and House Sub-Committee on Labor Standards. Note that the "Public Sector, FLSA Coalition" composed of the National League of Cities, National Assn. of Counties, Council of State Governments, U.S. Conf. of Mayors, National Public Employee Relations Associations, and others prepared a "Briefing Paper" in April 1996 which provides: "Option: Either by statute or revised regulations eliminate the salary basis test and rely on a revised duty test." FLSA Coalition Briefing Paper (Wash., D.C., April 1996).

ployee organizations. As a result of those comments, the DOL issued its September 6, 1991 interim rule removing the part-day docking from the salary basis test in the public sector provided the employee *otherwise met the requirement of exempt status (including the other salary requirements)*, and provided the public agency was bound by principles of public accountability by law. 56 Fed. Reg. 45824 (Sept. 6, 1991) (Pet. App. at 86a). The DOL continued to receive comments and on August 19, 1992 issued its final ruling removing the part-day docking from the salary basis test in the public sector under the conditions explained above. 57 Fed. Reg. 37666 (August 19, 1992) (Pet. App. at 184a).

Although the Department determined there was sufficient justification to remove the part-day docking rule from the public sector, it expressly stated that the hundreds of commentators failed to present sufficient justification to remove entirely the salary basis test from the public sector. *Id.* at 37673 (Pet. App. at 208a-209a), or to revise the salary basis test to permit disciplinary suspensions of less than a pay period for public sector employees. (Pet. App. 209a-210a).[24]

Separately, in 1985 the Department invited comments on all of its exemption rules. After an extensive open comment period closed in 1987, over 200 comments were made with no suggestions on the salary *basis* test, disciplinary docking rule or window of correction. Since 1987, the Department has repeatedly invited additional

[24] "[T]he comments failed to demonstrate that public employers are significantly more restricted in the availability of options with respect to employee discipline than private employers. Although public employee terminations may require compliance wtih procedures designed to protect employee rights, termination for disciplinary reasons is not generally unavailable. In addition, other remedies for disciplinary infractions, such as official reprimands, demotions, and reassignment or restriction of duties, are generally available and used in the public sector." 57 Fed. Reg. 37674 (Pet. App. at 210a).

comments. Most recently, on May 13, 1996, the DOL published a Notice of Proposed Rulemaking with an appropriate comment period concerning the salary basis regulations. 50 Fed. Reg. 47696; 61 Fed. Reg. 23238 (May 13, 1996). (J.A. at 43-46).[25]

II. THE FLSA SALARY BASIS AND DISCIPLINARY DOCKING RULES ARE REASONABLE AND EFFECTIVE ENFORCEMENT COMPONENTS OF THE NATIONAL HOURS OF WORK STANDARD.

A. The Salary Basis Test Is A Reasonable Exemption Standard and an Effective Enforcement Tool.

This case involves the application of the "salary basis/anti-disciplinary docking" requirement for exempt executives and managerial administrators.[26] The regulations under review provide that such exempt employees must be paid on a "salary basis." Early on, the DOL found, after extended hearings, that true, high paid executives

[25] "Alternatives likely to be considered include particular changes to address "salary basis" and salary level issues to a comprehensive overhaul of the regulations that also addresses the duties and responsibilities tests." (J.A. at 45).

[26] These issues have been widely litigated. See, "Table A: FLSA Salary Test Conflicts In Circuits" to the *Cert. Pet.* in this case which lists and compares twenty-four salary basis tests from all of the Circuit Courts of Appeal except the First and Third. The meaning of "subject to" had been faced in all of those circuits. The "window of correction" had not been faced in the District of Columbia, the Fifth Circuit, and the Tenth Circuit, as well as, the First and Third."

Since the petition was filed, the Second, Third, Ninth and Tenth have issued additional decisions. *See, Yourman v. Dinkins*, slip op. 95-7561 (2d Cir. 1996), *cert. pending*; *Balgowan v. New Jersey Dept. of Transportation*, slip op. 95-5276 (3d Cir. 1996), *vacated on other grounds, pending reh'g*; *McGuire v. City of Portland*, slip op. 95-35591 (9th Cir. 1996); *Hackett v. Lane County*, slip op. 95-35283 (9th Cir. 1996); *Hernandez v. Santa Anna*, slip op. 93-56634 (9th Cir. 1996); and *Carpenter v. Denver*, 82 F.3d 353 (10th Cir. 1996), *cert. pending*. These new decisions all support the majority of circuits. See n.32.

and exempt administrators are paid on a salary basis rather than as hourly employees. *See,* 19 Fed. Reg. 4405 (1954); Kantor Report (1958) (salaried status "is an index of the status that sets off the *bona fide* executive from the working squad-leader.") (J.A. at 42).

The salary basis test is the most objective barometer of exempt status. It is applied without the time study or desk audit required to apply the duties tests. The duties test under the applicable regulations are difficult to apply, require individualized employee-by-employee studies of what work is being done and for what period of time, and the subjective.[27] When reviewed by a DOL field examiner, an employer's personnel office, or a federal judge called upon to apply them, the duties test generates the feeling which Judge Cahill faced in this case after the fifth full day of trial—

> So, in summary, what I'm telling you now is, obviously I have not made up my mind about this case. I've played the ping-pong role here. The balls have bounced back and forth and so has my mind, so I have not decided on the case in any way. Trial Trans. V, 168 (J.A. at 94).

The salary test is exactly the objective barometer that best settles the close question of who is exempt and who is not.

> Essentially, the salary tests are guides to assist in distinguishing *bona fide* executive, administrative and professonal employees from those who were not intended by the Congress to come within these categories. They furnish a practical guide to the investi-

[27] For example, the duties test for an exempt administrator requires a fact specific analysis of whether a particular employee's primary duty consists of office or non-manual work "directly related to management policies or general business operations," and whether the employee customarily and regularly exercises discretion and independent judgment; whether the employee performs these duties only under general supervision; and a study of the amount of time the employee is engaged in exempt as compared to non-exempt activities. 29 C.F.R. § 541.2 (Pet. App. at 78a).

> gator as well as to employers and employees in borderline cases, and simplify enforcement by providing a ready method of screening out the obviously nonexempt employees. [Kantor Report (1958); J.A. at 42.]

B. The Disciplinary Docking Rule Is A Reasonable Exemption Standard and a True Measure of Salaried Status.

After the 1991/1992 regulatory amendment, which removed the "part day docking rule" from the public sector salary basis test while retaining the remainder of the salary test, 29 C.F.R. § 541.5d, some questioned whether there is a rational basis for the disciplinary docking provision of the salary basis test. Others, including Judge Posner in *Wisconsin v. Mueller,* 54 F.3d 438 (7th Cir. 1995), *cert. pending* (Case No. 96-586), accepted its rationality but failed to fully appreciate its need and purpose.[28] The question is not as challenging as some have made it: (1) no special justifications such as public accountability apply, and (2) Congress never intended the exemptions to apply to those subject to discipline.

First, DOL's reason for revising the basic thirty-seven year old salary basis test by removing the part day docking rule from its public sector provisions was *not* that under normal conditions that test was not a tried and true indicator of non-exempt status. Rather, the justification for the revisions was that "requirements of public

[28] In reviewing the general rationality of the disciplinary docking rule, the Ninth Circuit Court of Appeals explained that although at first blush the rule may not seem logical, a closer examination of the history behind the regulation reveals the salary basis test is a sound and rational method of "defining and delimiting" the exemptions. *Craig v. Far West Engineering Company, Inc.,* 265 F.2d 251, 259 (9th Cir.) *cert. denied,* 361 U.S. 816 (1959). Significantly, the Ninth Circuit relied on the fact that the DOL's 1940 report and recommendations "indicated that the employers participating in the hearings were unanimous in approving the salary test because . . . [it] is a valuable and easily applied index." *Id.*

accountability" often subject executives and managerial administrators to part day deduction who would never be so subjected. 57 Fed. Reg. 37666 (1992). This was claimed, but certainly not universally demonstrated, to be caused by state constitutional and statutory rules. The argument was that state restraints require that all public employees be docked pay when they do not come to work, even for a short period. *Id.*; (Pet. App. at 190a-192a). The Department of Labor found in 1991, after considerable appeal by Governors and county and municipal officers, that these "principles of public accountability" created a situation in which particular and peculiar public accountability requirements, unrelated to the salary basis test, prevented full compliance with the part day docking rule. *Id.*

No such special principles of public accountability apply to the disciplinary docking rule. Any public employer may adopt disciplinary code subjecting its top executives and managerial administrative employees to forms of discipline other than disciplinary suspension for less than a full work period. *See,* 57 Fed. Reg. 37666 (1992); (Pet. App. at 210a) (DOL noting employers may adopt "other remedies for disciplinary infractions, such as official reprimands, demotions, and reassignment or restriction of duties . . ."). (Pet. App. at 210a). *See, also, above* n.3.

Second, as has been the case since at least World War II, the basic concept of highly paid American executive and managerial administrators is that such employees would not be subject to losses of pay over a brief term for disciplinary infractions. Reports promulgated after World War II and in 1954 are just as binding today as they were then,[29] some things change with decades; some

[29] *Compare,* Weiss Report (1949) (J.A. at 39) (Noting disciplinary deductions of executive, administrative and professional employees were a war time phenomenon. "Such deductions are rarely made today. The disciplining of such employees in the rare instances where it is needed is usually accomplished in other ways than by deductions from salary.") with 57 Fed. Reg. 37666 (1992) (Noting public employers can discipline executive, administrative and professional employees in ways other than through short disciplinary deductions.) *See, above,* at 27, on 19 Fed. Reg. 1321 and 4405 (1954).

remain constant. High executives, top managerial administrators and true professionals are independent, enjoy broad discretion, control their own work place *and* earn compensation which is not conditioned on avoiding discipline. They need no hours of work standard. Disciplinary conditions on pay are a truer marker of the non-exempt employee who does need hours of work protection. The employee who is "subject to" discipline does not loose exempt status on the basis of a *technicality*. Rather, the employee which an employer thinks of as potentially needing discipline could never be a true executive, exempt administrator or professional, even if her or she seems to fulfill the *technicalities* of the duties test. The "salary basis" test is the truer measure because it is a superior measure of intent. Respondents below, put forward no argument with regard to disciplinary deductions which varies from the arguments put forward by private management associations in the 1940's and 1950's.

The exempt are the disciplinarians; those subject to discipline are the non-exempt.

Further, the disciplinary docking rule as it specifically applies in the law enforcement context, not only raises no accountability issue, but it is operationally reasonable. Public employers need not claim that they *must* suspend sergeants and lieutenants for periods of less than a week for rule infractions. Other forms of discipline are superior. Suspensions in pay remove much needed officers from the streets of our communities and other important law enforcement duties. Moreover, for an overworked sergeant or lieutenant, a day or two "vacation" may not be viewed as disciplinary at all. The loss of accrued vacation leave, denial of preferred assignments, written repri-

mands, and reductions in evaluations are far more effective.[30]

III. THE EIGHTH CIRCUIT'S AMBIGUITY CONVERTS A CLEAR, OBJECTIVE, ENFORCEABLE RULE TO ONE WHICH IS UNCLEAR AND UNENFORCEABLE.

What did the Eighth Circuit Mean? The Court of Appeals found—

> *Arguably,* the department's two-day deduction from Sergeant Guzy would require him to be treated as a non-exempt employee.
>
> A one-time deduction, however, does not *automatically* require the determination that all Sergeants are non-salaried. The regulations provide for a "window of correction." (Pet. App. at 9a) (emphasis supplied).

What does this mean? Did the court find that non-exempt status was, in fact, lost but that the problem was then corrected by the "window of correction"; or did it find that exempt status was only *arguably,* but not actually, lost? Was exemption "lost" for *all* and then "regained" for all Sergeants and Lieutenants, even those who loyally avoided discipline, or only for Guzy? Or, did only Guzy lose the exemption? Did the Court mean that while Sergeants are not *automatically* non-salaried, based on the disciplinary code and its application to Guzy, they would have been "nonsalaried" *but for* a proper use of the

[30] *See,* U.S. Department of Labor, Wage and Hour Division, Letter Ruling, January 13, 1994 (Explaining that truly exempt employees may be disciplined in other ways than suspensions without pay. "It would appear that reducing accrued leave entitlement by a day or days for the infraction could achieve the desired disciplinary goal. In our view, such a practice would not affect the salary basis."); *McGuire v. Portland,* slip op. 95-35391 (9th Cir. 1996); and *Wisconsin v. Mueller,* 54 F.3d at 442, 443 (7th Cir. 1995); 57 Fed. Reg. 37666, 37674 (Pet. App. 209a-210a).

"window of correction"? What happens when the window closes?

What did the Court intend by its legal conclusion that—

> Under the unique circumstances surrounding Guzy's disciplinary loss of pay, we believe that the department made a one-time deduction, and did not make the disciplinary deduction from Sergeant Guzy pursuant to an established policy (Pet. App. at 10a).

Did this mean that deductions, actually made pursuant to an express authorization which was later amended, were never made "pursuant to an established policy?"

What was intended by the Court's statement that "Finally, [Guzy's deduction] fits within the 'window of correction' express requirement that the deduction be 'for reasons other than lack of work,' because it was imposed as a disciplinary measure[?]" (Pet. App. 10a). Did the Court mean that all disciplinary deduction situations fit within the window of correction, even intentional deductions? None of this is clear.

The Solicitor General's *amicus curiae* opposition to *certiorari* muddies the waters further by dropping the word "*automatically*" from Eighth Circuit language, (*see,* United States' Opposition to *Certiorari* at 6), and stating that "[A]lthough the courts of appeals are not in full agreement on the correct interpretation of the salary basis test, this case does not warrant review, in part, because the position articulated by the Secretary in this case may eliminate uncertainty in the lower courts." Note that the apparent "only actual, always correctable, docking" position of the Eighth Circuit is not the position which the United States goes on to articulate. The position of the Eighth Circuit in this case and that of the Department of Labor under the applicable regulations are clearly not the same.[31] See Appendix B on the recent articulations

[31] The Solicitor General's Brief In Opposition To *Certiorari* apparently supports the Eighth Circuit in this case only on the basis

of the applicable rules by the Solicitor General and Solicitor of Labor.

The Police Board argued in opposition to *certiorari*, that the Eighth Circuit considered and rejected "the argument that a possibility of an improper deduction [on the basis of a subject to rule] alone destroys" exempt status. Is that so? Did the Eighth Circuit so rule, or did it avoid ruling on the simple basis of a claim that, even if the Sergeants or Lieutenant's were non-exempt, they became exempt by operation of the "window of correction?"

IV. ALL PUBLIC EMPLOYEES WHO *AS A PRACTICAL MATTER* ARE SUBJECT TO IMPERMISSIBLE DISCIPLINARY SUSPENSIONS UNDER 29 C.F.R. § 541.5(d) AND § .118(a)(5) ARE COVERED BY THE NATIONAL HOURS OF WORK STANDARD.

The St. Louis Police Sergeants and Lieutenants are not salaried because they are subject to a disciplinary code authorizing suspensions in pay for less than a full pay period on the basis of over 40 non-safety infractions.

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of a misperception of facts. See "The Facts" outlined in the Statement of the Case above. For example, the Solicitor states that "*state law* has provided that St. Louis police Sergeants *receive* a yearly salary." This is inaccurate; the applicable Missouri Statute does not provide that the sergeants will receive anything, it authorizes the Police Board to set compensation up to a stated maximum. (J.A. at 17 and 70). The Solicitor states, based on an understandable misunderstanding (the Solicitor had access to neither the record nor the Joint Appendix at the time) that the Police Board imposed a disciplinary suspension without pay in only one instance. (But *see*, J.A. 49, 57, 60-64, 76, 85.) And, the Solicitor distinguished *Auer* from other cases without knowing that "other factors" in *Auer* do support the hourly status. (J.A. at 48, 64, 76-78, 81 and 87.) Finally, although apparently disagreeing with the Eighth Circuit's application of the "window of corrections," the Solicitor cast aside as not warranting review, the fact that Guzy's deductions were not "inadvertent," that no reimbursement has been made, and that the respondents did "not modify their entire disciplinary code." *See*, Solicitor's Brief at n.9.

The "subject to" rule is tested neither by *merely* theoretic technicalities nor by an absolute requirement of actual deductions. The first alternative might result in inadverent loss of salaried status by lack of employer attention to unintended rules which exist only on paper. The second would limit application of the maximum hours of work standard to rule breakers who are actually suspended.[32]

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[32] A strong majority of eight Circuit Courts of Appeals support a rule which holds that when the employer has an express, unambiguous rule which subjects employees to impermissible disciplimary deductions, the employees are non-salaried for FLSA purposes. These circuits hold that actual deductions are not determinative. *See, Yourman v. Dinkins*, slip. op. 95-7561 (2d Cir. 1996), *cert. pending*; *Balgowan v. New Jersey Dept. of Transportation, slip op. 95-5276 (3d Cir. 1996) vacated on other grounds pending reh'g*; *Kinney v. District of Columbia*, 994 F.2d 6 (D.C. Cir. 1993); *Shockley v. Newport News*, 997 F.2d 236 (4th Cir. 1991); *Klien v. Rush-Presbyterian*, 990 F.2d 279 (7th Cir. 1993); *Abshire v. County of Kern*, 908 F.2d 483 (9th Cir. 1990), *cert. denied*, 498 U.S. 1068 (1991); *Carpenter v. Denver*, 82 F.3d 353 (10th Cir. 1996), *cert. pending*.

The Sixth Circuit is in agreement with this majority holding, but with the clarification that if it is unclear whether the employer has an express policy which would subject the employee to impermissible deductions, or if the policy is ambiguous, then the courts must look to see if an actual deduction has occurred to determine whether the employees are subject to such impermissible deductions. *Michigan Ass'n of Government Employees v. Dept. of Corrections*, 992 F.2d 82 (6th Cir. 1993).

The Eleventh Circuit, which in *Atlanta Firefighters Professional Association v. Atlanta*, 920 F.2d 800 (1th Cir. 1991) previously seemed to support the minority rule requiring actual deductions, has now clarified that a single impermissible disciplinary deduction made pursuant to an express policy is enough to make the entire class of employees non-exempt. *Avery v. Talladego*, 24 F.3d 1337 (11th Cir. 1994).

With the very recent decisions of the Second, Third and Tenth Circuits (see n.26), the shrinking minority only includes the Fifth and Eighth Circuits. However, a careful review of those decisions

The test is more practical than either extreme. It is one fully cognizant of the real work-a-day world. Salaried status is absent whenever employees know that as a practical matter they are subject to disciplinary suspensions for a portion of their work period's compensation.[33] Employees covered by a widely publicized disciplinary code know that they are covered and respond accordingly, whether or not they or their work mates have actually been docked. The very purpose of disciplinary docking rules is to discourage the conduct prohibited.

As a practical matter, St. Louis Police Sergeants are subject to the Police Manual's disciplinary docking code.

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reveals that even those courts do not clearly and consistently apply a strict "only actual deduction" rule.

The Fifth Circuit in *York v. Witchita Falls*, 944 F.2d 236 (5th Cir. 1991) advances an "only actual deduction" rule. However, it has held only that the employees before it were salaried because "it had no evidence before it of either actual deductions *or a policy* of docking pay." *Id.* at 242. Thus, it is not clear how the Fifth Circuit would rule if a clear, express policy authorizing impermissible deductions existed.

Finally, the Eighth Circuit in *McDonnel v. Omaha*, 999 F.2d 293 (8th Cir. 1993), *cert. denied*, 114 S.Ct. 1188 (1994), did state that it was following an "only actual deduction" rule. However, as discussed above, *McDonnel* may be muddled by the Eighth Circuit's ambiguous ruling in this case including its statement that "*[a]rguably*, the department's two-day pay deduction from Sergeant Guzy would *require* him to be treated as a nonsalaried employee." (Pet. App. at 9a). (emphasis supplies).

[33] As stated by Judge Preska, in *Yourman v. Dinkins*, 826 F. Supp. 736, 743 (S.D.N.Y. 1993), *aff'd*, slip op. 95-7561 (2d Cir., May 31, 1996), *cert. pending*—

> "[U]nambiguous material generated by the DOL seems to recognize that actual deductions are unnecessary before the exemption is lost. In its promulgation of [29 C.F.R.] § 541.5d, the DOL declined the suggestion of one commentator [AFSCME] to 'alter[] the regulations to require that an actual deduction of pay occur before the exemption is lost.' 57 Fed. Reg. 37672. The DOL expressly found that requiring an actual deduction was inconsistent with the appropriate focus upon the pay system at issue. 57 Fed. Reg. 37673."

The code authorizes non-safety disciplinary suspensions without pay for less than a work period. "[O]ther factors" tailored their pay to hourly increments—that is, the form in which they earn and lose compensation was, in fact, on an hourly basis. This makes the Sergeants' and Lieutenants' pay contingent and hourly, not guaranteed or salaried. The code commands that they are not in charge of the work place; they do not own their own time.[34]

The *as a practical matter* standard is clearly met where, as here—

(a) a clear disciplinary code unambiguously authorizes impermissible deductions (Pet. App. at 102);

(b) the employer has disavowed neither the code nor its impermissible applications;

(c) the employer's chief executive officer (J.A. at 60-62), the FRCP 30(b)(6) designees (J.A. at 13-14, 49-57 and Respondent's Opp. Cert., App. 3-10), an employer witness who serves as supervisor to the employees (J.A. 76), an internal affairs investigator (J.A. 85), and numerous employees involved all testify that they are "subject to" such docking (J.A. at 63-64, 76, 85, 86-88);

(d) a representative/similarly situated witness was actually docked (Pet. App. at 217a-219a and J.A. at 87);

(e) a second witness testifies to actual deductions (J.A. at 85);

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[34] At the Secretary's urging, the Third Circuit concluded that simply receiving a guaranteed minimum weekly payment does not transform an otherwise hourly employee into a "salaried" one for FLSA purposes. *Brock v. Claridge Hotel & Casino*, 846 F.2d 130 (3d Cir. 1988), *cert. denied*, 488 U.S. 925 (1988). "Salary is a mark of executive status because the salaried employee must decide for himself the number of hours to devote to a particular task. . . . With regard to hourly employees, it is the employer who decides the worth of a particular task. . . ." *Id.*

(f) the employer never affirmatively establishes that the employees are not subject to impermissible disciplinary docking;

(g) the compensation administration of the employee and "other factors" reflect hourly status (J.A. at 3, 4, 6, 11-12, 16, 47, 58, 60-64, 76-78, 81 and 87); and

(h) the employer does not prove, or even claim, that the disciplinary code is either not applicable to the employees, or that it is a mere technical rule or mistake never intended to be used.

It is the potential for reduction that destroys exempt status, especially in the disciplinary code context. The frequency with which deductions, practically authorized, are made from an employee's compensation is not significant; as long as the compensation is subject to deductions, the salary test is defeated. Compensation is fixed and immutable and not subject to deduction, or is it contingent. *Abshire v. Kern County*, 908 F.2d 483 at 487 (9th Cir. 1990), *cert. denied*, 498 U.S. 1068 (1991).

The Eighth Circuit's rule—if it is that only actual, "non-idiosyncratic" disciplinary deductions violate the "subject to" rule—would determine exempt status by a group of employees' collective behavior; such a rule means that if a sufficient number of employees violate the disciplinary policy, in sufficiently generic circumstances, and are docked, *all* employees are covered *by* an hours of work standard. *But*, if employees generally abide by the rules so that they are never docked, or are docked only in few or unusual situations, the hours of work standard would be lifted from all. Such a rule is impractical, would make enforcement a quagmire, and must not be adopted. *See, Balgowan v. New Jersey*, Stip. Op. 95-5276 at 11 and 12 (3rd Cir., May 16, 1996), *vacated on other grounds pending rehearing* and *Michigan Ass'n of Government Employees v. Michigan Department of Corrections*, 992 F.2d 82, 86 (6th Cir. 1993).

In a very limited sense, the Eighth Circuit was correct in holding that the "mere possibility of an improper deduction in pay does not defeat an employee's status." For example, a rule "on the books" which is commonly and widely known to be out of use will not defeat a non-exempt status. However, a serious intentional authorization of such improper deductions in the event of violation of an employer's well documented disciplinary code, designed by the employer to apply to all employees in question, which is clearly communicated, well understood, never disavowed, and actually applied *raises* the pall of disciplinary docking *as a practical matter* not only as a "mere possibility." The Eighth Circuit's adoption of the extreme "only actual deduction" rule should not be upheld.

V. THE "WINDOW OF CORRECTION" UNDER 29 C.F.R. § 541.118(a)(6) IS AVAILABLE TO CORRECT IMPERMISSIBLE DEDUCTIONS ONLY IN CASES OF (a) ACTUAL MISTAKE OR INADVERTENCE, (b) RESTORATION OF LOST COMPENSATION UPON DISCOVERY, AND (c) THE COMPLETE REVOCATION OF THE IMPERMISSIBLE RULES.

Guzy's two day suspension clearly was not inadvertent. It was done consciously, while this litigation was pending, and after the salary basis and disciplinary docking rules had been briefed before the district court on summary judgment. Even after its discovery and extensive discussion of the disciplinary docking rule, the Police Board continues to withhold Sergeant Guzy's docked pay, offering to reimburse him *only if required* to do so at the close of this litigation.

The Eighth Circuit held that 29 C.F.R. § 541.118(a)(6) provides a "window of correction" to an employer who revises a small part of the offending code and promises to refund offending deductions *only if ordered to do so by a court*, even in the case of post litigation, non-safety disciplinary suspension for less than a pay period.

The Eighth Circuit fails to place the burden on the employer (1) to establish that actual deductions made were mistaken or inadvertent, (2) to revise all offending portions of the disciplinary code immediately, and (3) to seek out and refund all offending deductions upon discovery. This is contrary to the accepted rule; all three pre-conditions are necessary to the use of the window. See, *Martin v. Malcolm Pirnie, Inc.*, 949 F.2d 611 (2nd Cir. 1991), *cert. denied*, 506 U.S. 905 (1992); and *Klein v. Rush-Presbyterian-St. Luke's Medical Center*, 990 F.2d 279 (7th Cir. 1993); *see*, Peikes, "Tightening the White Collar Exemptions—the Court Breaths New Life into the Fair Labor Standards Act," 10 *The Labor Lawyer* 121 at 136-40 (1994); and The Thompson Group, *Fair Labor Standards Handbook for State, Local Governments and Schools* (Washington, D.C., 1989, supplemented monthly), § 222 at 32-33; *see also*, DOL's position as outlined in Appendix B.

The Eighth Circuit's ruling would permit an employer to intentionally act in a manner inconsistent with the salarly basis test with impunity. Even after being sued, an employer would be able to take advantage of exemptions to which the employer previously was unentitled. Employers could avoid the application of the FLSA hours of work standard since only a conditional post-litigation promise to reimburse deductions with a promise of limited future compliance would be required.

The regulation at 29 C.F.R. § 541.118(a)(6) requires that an employer's pre-litigation intention is decisive in determining whether the window of correction is available. Disciplinary deductions made pursuant to an established written policy and continued after they are discovered, and even after the initiation of litigation challenging them, necessarily indicates no intention to pay an employee on a salaried basis.

The Eighth Circuit's suggested approach would be to rob the salary basis regulation of any teeth. A stricter

rule is necessary to prevent the incongruous situation of employers cynically undertaking corporate or agency policies which subject the compensation of all white collar employees to reduction for reasons other than lack of work, knowing that exempt status of the affected employees could be restored through a promise of reimbursement in the event of a litigation loss and a promise to reform any limited portion of the rules which are established in litigation to have actually been applied to the challenging litigants. Voluntary compliance with the Act, absent litigation, would face a serious threat by any employer who engaged in the too frequent calculus of the cost of compliance versus the cost of non-compliance. See, Appendix B.

CONCLUSION

For all of the foregoing reasons, this Court should reverse the judgment below.

Respectfully submitted,

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APPENDICES

APPENDIX A

The Federal Register & The FLSA "Salary Basis" Test

29 C.F.R. part 541.1 through 5. (October 19, 1938) First published without "Salary Basis".

5 Fed. Reg. 4077 (1940). First regulatory annunciation of "Salary Basis."

"Stein Report." October 10, 1940. (J.A. 21).

"Weiss Report." June 30, 1949. (J.A. 36)

19 Fed. Reg. 1321 (1954). Notice of Proposed Rule Making. Incorporating "Salary Basis" rules, but without current disciplinary docking language.

19 Fed. Reg. 4405 (1954). Final "Salary Basis" Rule incorporates current "Salary Basis." Adds Disciplinary Docking Rule In Response to Comments.

"Kantor Report" (March 3, 1958). (J.A. 42).

40 Fed. Reg. 27640 (1975). Adjusts "Salary Levels."

43 Fed. Reg. 3779 (January 24, 1978). Notice of delay in public safety hours of work study under FLSA section 7(k).

44 Fed. Reg. 70589 (December 7, 1979). Announces study on FLSA section 7(k). Averages hours of work for public safety occupations at less than 216 hours in 28 days.

46 Fed. Reg. 3013 (January 13, 1981). Final rule on "Salary Levels" intends increase to be effective February 13, 1983.

46 Fed. Reg. 11972 (February 12, 1981) Final rule on increase "Salary Levels" stayed by new Administration "indefinitely." This continues to today.

48 Fed. Reg. 40518 (1981). Revised FLSA section 7(k) law enforcement work period as a result of *Jones v. Donovan*, Slip Op. 79-2973; 25 W.H. Cases 380 (D.C. Cir. 1981), *aff'd mem.*, 675 F.2d 1340 (D.C. Cir. 1982). Sets 171 hours in 28 days as work period.

50 Fed. Reg. 47696 (1985). Notice of Proposed Rule Making on Part 541. "Indefinite stay" on "Salary Levels" continued.

51 Fed. Reg. 2525 (January 15, 1986). Extension of Comment Period on 29 C.F.R. Part 541 Exemption Rules.

51 Fed. Reg. 13413 (April 18, 1986). Notice of proposed rule making on FLSA in State and Local Agencies, 29 C.F.R. Part 553.

52 Fed. Reg. 2019 (January 16, 1987). Advance Notice of Proposed Rulemaking on rule for State and Local Agencies in 29 C.F.R. Part 553.

52 Fed. Reg. 2032 (1987). Publication of final rules to State and Local Agencies in 29 C.F.R. Part 553.

56 Fed. Reg. 45824-30 (September 6, 1991). Interim Rule on Public Sector "Salary Basis." 29 C.F.R. § 541.5(d) (Pet. App. 86a).

57 Fed. Reg. 37666 (August 19, 1992). Final Rule on Public Sector "Salary Basis." 29 C.F.R. § 541.5(d) (Pet. App. 184a).

59 Fed. Reg. 57130 (November 14, 1994). Regulatory Agency. Announces Delayed Schedule on Part 541 exemption rules.

60 Fed. Reg. 23544 (May 8, 1995). Regulatory Agenda. Republished above nearly verbatim with revised schedule.

60 Fed. Reg. 59608 (November 28, 1995). Regulatory Agenda. Republishes above, edits out "sorely out of date," with revised schedule.

61 Fed. Reg. 23238 (May 13, 1996). Regulatory Agenda. Republishes above. (J.A. 43.)

APPENDIX B

DOL POSITION 1991-1996[1]

1. August 16, 1991. Solicitor of Labor Brief in *Martin v. Malcolm Pirnie*, 949 F.2d 611 (2d Cir. 1991), *cert. denied*, 119 S. Ct. 298 (1992).

Subject To:

"In expressing approval of the Department of Labor regulations and agreement with *Abshire* [], the district court noted that the *Abshire* court 'reject[ed] defendant's argument that employees are salaried because no deductions were actually made. . . . As the district court explicitly stated, 'it is the *potential for reduction that destroys exempt status.*' " at pp. 19-20 (emphasis in original) [See also, p. 23 where DOL argues "subject to" cases are consistent with regulations.]

* * * *

"As the Ninth Circuit noted in *Abshire*, it is 'misleading and irrelevant' to claim that employees whose pay was subject to reduction should be considered salaried because no actual reductions occurred." at p. 36.

Window of Correction:

"The Secretary's position only prevents an employer from using 29 C.F.R. 541.118(a)(6), when the reduction is *not* inadvertent, where, such as here, the reduction is based on a policy of the employer." at p. 30 (emphasis in original).

* * * *

---

[1] This appendix collects the position of the Solicitor General and the Solicitor of Labor expressed in briefs filed in the United States Courts of Appeals and this Court between 1991 and 1996.

"The district court's interpretation of the corrective provisions of 29 C.F.R. 541.118(a)(6) circumvents the remedial purpose of FLSA, as it provides an avenue whereby employers may avoid their overtime pay obligations altogether. In this respect, an employer could adopt and continue an hourly basis of compensation until its plan is challenged. Upon receiving a challenge, the employer would wipe out all back wage liability to its employees by claiming 'inadvertence,' converting prospectively to a legitimate salary basis plan, promising to comply with the salary requirements in the future, and reimbursing the few employees who had suffered actual cash deductions." at p. 31. [Court noted so long as such a policy existed it could not be inadvertent.]

* * * *

2. July 16, 1992. Solicitor General's Supreme Court Opposition to *Certiorari* in *Martin v. Malcolm Pirnie*, (No. 91-1748).

Window of Correction:

"In our view, the court of appeals was clearly correct in deciding that a series of deductions made in accordance with written company policy may not be termed 'inadvertent.' . . . The Department's construction helps to 'prevent the incongruous situation of employers cynically undertaking corporate policies which subject the salaries of their professional, managerial and administrative employees to reduction for reasons other than lack of work, knowing that the exempt status of the affected employees would be restored through reimbursement and a promise to comply, if the employer is caught." at pp. 8-9.

* * * *

3. November 27, 1992. Solicitor General Brief in *Martin v. Monks*, 1993 U.S. App. 20610 (6th Cir., 1993).

Subject To:

"Significantly, it is not necessary that actual deductions for partial day absences occur to defeat the salary test." at p. 23.

* * * *

"First, the frequency with which deductions are made from an employee's pay is not significant; as long as the pay plan under which the employee is compensated is subject to impermissible deductions, the salary requirement will be defeated. *See* 29 C.F.R. § 541.118(a); *Malcolm Pirnie, Inc.*, 949 F.2d at 615, 617; *Abshire*, 908 F.2d at 486, 487. Thus, whether or not the deductions made by Monks for partial day absences were frequent or few is not at issue. What is significant is that Monks' pay policy allowed for such deductions, and that they were taken." at p. 25.

Window of Correction:

"In the instant case, any deductions made from Monks' employees' pay as a result of partial day absences were not inadvertent, because the deductions were the result of Monks' policy." at p. 32.

* * * *

4. August 17, 1993. Solicitor of Labor's brief in *Reich v. Pierce*, 1994 U.S. App. Lexis 26194 (6th Cir., 1994).

"FLSA exemptions are to be narrowly construed in order to further Congress' goal of providing broad federal employment protection." p. 14 (citing, *Mitchell v. Lublin, McGaughy & Ass.*, 358 U.S. 207, 211 (1959).

Subject To:

"Numerous courts, including this one, have held that even if the employer never actually makes the deductions, the salary test is not met where the employer maintains a policy which *subjects* the employee's pay to dockings for partial day absences." pp. 17-18.

Window of Correction:

"In addition, the Secretary interprets section 541.118 (a)(6) as only applying where the impermissible pay deductions are inadvertent." at p. 30.

DOL complains that the employer said that he would only reimburse its employees if the Court found a violation existed. The DOL argues that this means the deduction was not inadvertent since the employer still claims he does not need to repay it. at pp. 36-37.

* * * *

5. January 17, 1995. Solicitor of Labor's *amicus curiae* brief in *SEIU v. San Diego*, 35 F. 3d 483 (9th Cir. 1994), *en banc denied, supp. op.*, 60 F.3d 1346 (9th Cir. 1995), *cert. denied*, 64 U.S.L.W. 3484 (January 16, 1996)

Regulatory Deference:

"On August 19, 1992, the Secretary, after following appropriate rulemaking procedures, promulgated a regulation allowing for the section 13(a)(1) exemption to be invoked by public agency employers if the employees are paid on a 'salary basis' in all respects other than that deductions from their pay are required to be taken for absences of less than a day, in accordance with principles of public accountability. *See* 29 C.F.R. 541.5d (57 Fed. Reg. 37,666, 37,677). These modifications, resulting from reasoned changes of position by the Secretary, are entitled to deference. *See, Rust v. Sullivan*, 500 U.S. 173, 186 (1991)." at n.2, in part.

Salary Basis:

"Pursuant to this broad statutory authority, the Secretary promulgated a regulatory 'salary basis' requirement in 1940, 5 Fed. Reg. 4077, and a "salary basis" regulation that fleshed out this requirement in 1954,

19 Fed. Reg. 4405 (codified at 29 C.F.R. 541.118). *See also*, 19 Fed. Reg. 1321 (1954)." at p. 5.

* * * *

"Subjecting an employee's pay to deductions for absences of less than a day, including absences as short as an hour, is completely antithetical to the concept of a salaried employee. A salaried employee is compensated not for the amount of time spent on the job, but rather for the general value of services performed. It is precisely because executives are thought not to punch a time clock that the salary test for bona fide executives [and administrative and professional employees] requires that an employee's predetermined pay not be subject to reduction because of variations in the . . . quantity of work performed —especially when hourly increments are at issue. *Abshire*, 908 F.2d at 486. *See also Brock v. Claridge Hotel and Casino*, 846 F. 2d 180, 184 (3d Cir.), *cert. denied*, 488 U.S. 925 (1988). As the Supreme Court stated, '[T]he FLSA was designed to give specific minimum protections to *individual* workers and to ensure that *each* employee covered by the Act would receive a fair day's pay for a fair day's work and would be protected from the evil of overwork as well as underpay.' *Barrentine v. Arkansas Freight System*, 450 U.S. 728, 739 (1981) (emphasis in original) (internal quotations and footnote omitted).

Moreover, the Secretary's application of the salary basis test to the public sector appeared to be fully consistent with congressional intent. When Congress brought all public employees within the coverage of the FLSA in 1974, provid[ing] that virtually all non-supervisory government employees will be covered, it certainly was aware of the Secretary's salary basis test, which was identical to the regulation the panel determined Congress did not intend to have applied." at pp. 7-8.

* * * *

"The panel stated that since public employers could not satisfy the 'salary basis' test because of their systems of 'public accountability,' *none* could qualify for the 'executive and administrative exemption' prior to September 6, 1991. LEXIS 27705, at *14 (emphasis added). This is simply not true. First, not all public employers are constrained by systems of 'public accountability.' *See* 57 Fed. Reg. 37,666, *passim* (1992). Second, as this Court recognized, '[n]othing in private or public employment law suggests that a 'bona fide executive' must punch a time clock, nor that he must suffer a day-deduction if he is late for work or occasionally uses a small portion of his time to take care of personal necessities. . . .' *Abshire*, 908 F.2d at 489-90. With this observation, this Court was merely recognizing the reality of the public sector work place, where, regardless of the pay systems in existence, certain employees *are* paid on a salary basis and thus *are* properly treated by their employers as exempt, even under the old regulation. *See* 56 Fed. Reg. 45,824, 45,825 (1991) ([M]ost public employers consider otherwise-exempt employees to be exempt, notwithstanding public sector pay systems under which their pay is subject to deductions for absences of less than one day.) *Cf. Hartman v. Arlington County, Virginia*, 720 F. Supp. 1227, 1229 (E.D. Va. 1989) (public employer changed its pay system to come into compliance with salary basis regulation), *aff'd*, 903 F.2d 290 (4th Cir. 1990)." at 12-13.

* * * *

6. January 10, 1996. Solicitor General's Opposition to *Certiorari* in *Wisconsin v. Mueller*, 54 F.3d 1249 (7th Cir. 1995), *cert. pending*, (Case No. 95-586).

Disciplinary Deductions:

"Thus, employees are not paid on a salary basis if they are subject to unpaid disciplinary suspensions

of less than a week's duration as a penalty for infractions of a work rule other than a major safety rule. See *Klein v. Presbyterian-St. Luke's Medical Center*, 990 F.2d 279, 285 (7th Cir. 1993)." at pp. 3-4.

* * * *

"Thus, because he determined that the partial day absence regulations enacted before Congress extended the FLSA to state and local government employers were not efficaciously 'distinguish[ing] exempt from non-exempt public employees,' the Secretary exempted such employees from that rule.

At the same time, however, the Department retained the disciplinary deduction rule contained in 29 C.F.R. 541.118(a). 57 Fed. Erg, 37,674 (1992). The Department concluded that the comments it had received had not provided a 'sufficient basis' for determining 'that public employers are significantly more restricted in the availability of options with respect to employee discipline than private employers. The Department noted that both public and private employers had disciplinary options wholly consistent with the Section 13(a)(1) overtime exemption, such as termination, official reprimands, demotions, and reassignment or restriction of duties." at pp. 6-7.

Notes 15 and 16 explain that the disciplinary deduction rule is a "legislative regulation" deserving of deference and that the rules on the "salary basis test" and "disciplinary deductions" requirements for Section 13(a)(1) are reasonable exercises of DOL's regulatory authority.

". . . the Department's exemption of public employers from another element of the salary basis test—the partial day absence rule, see 29 C.F.R. 541.5d—does not establish that the Department acted unreasonably in deciding not to differentiate between private and public employers with respect to the disciplinary deduction rule.

By contrast, public accountability principles do not require public employers to impose particular forms of discipline, such as unpaid suspensions of less than a week for minor infractions, and such employers have a range of other options for implementing discipline that would allow them to preserve the exemption, should they desire to do so, for particular classes of employees." at pp. 17-18.

* * * *

"The Department's response to comments received during the 1992 rulemaking does not support [the] claim that the Department admitted that using its salary basis test against public employers had been contrary to the intent of Congress. Rather, the Department's response makes clear that it determined that the partial day deduction component of the salary basis test was 'unduly restrictive when applied in the public sector,' and that exemption from that aspect of the salary basis rule was appropriate." at n.18.

* * * *

7. March 4, 1996. Solicitor of Labor's *amicus curiea* Breif in *Jackson v. Kentucky*.

Disciplinary Docking & Window:

"The Secretary also urges reversal of the district court's ruling that the so-called 'window of correction' was applicable in this case, despite the fact that the Commonwealth had an established policy that permitted making disciplinary deductions for less than a week's time for matters not involving infractions of safety rules of major significance, which is clearly inconsistent with the 'salary basis' test." at p.6.

Window of Correction:

". . . the district court's decision that the Commonwealth should be able to avail itself of the 'window of correction even though it has long had a policy which permitted disciplinary deductions to be made to otherwise exempt employees' should not be allowed to stand. The court's ruling would permit public employers to intentionally act in a manner inconsistent with the 'salary basis' test with impunity; even if sued, an employer would still be able to avoid the payment of overtime since only the reimbursement of deductions and a promise of future compliance are required under the 'window of correction.'" at p. 7.

Disciplinary Deductions:

"DOL's decision to leave the disciplinary part of the 'salary basis' test unchanged was a reasonable policy choice made pursuant to the broad charge it was given to define the Section 13(a)(1) exemption criteria.

The mere invocation of the term 'public accountability' does not resolve the matter. As the district court stated 'No compelling public policy reasons make the disciplinary prong of the salary test more problematic for public employers than large-scale private employers. . . . [The district court listed available alternatives earlier cited by DOL] in concluding that 'the comments [to the interim rule] failed to demonstrate that public employers are significantly more restricted in the availability of options with respect to discipline than private employers.'" [citations omitted]. at p. 26.

* * * *

"In the Commonwealth, which challenges the disciplinary part of the 'salary basis' test *only* as it applies to the public sector, refers to statutes dealing with

the discipline of its own employees. Yet an investigation of the disciplinary provisions cited nowhere reveal any mandatory discipline. . . . the district court correctly held that the Secretary acted reasonably by not changing the disciplinary prong . . ." at p. 28 [Contrast this reference to the "non-mandatory" nature of disciplinary rules with the distinction between rules "permitting" but not "requiring" discipline made in the Solicitor General's *amicus* opposition to *certiorari* in *Auer* at 12.]

Window of Correction:

"The window of correction should not be available to an employer who makes impermissible 'salary basis' deductions pursuant to an established policy." at p. 35.

* * * *

"The regulation at 29 C.F.R. 541.118(a)(6) makes clear that an employer's intention to pay on a 'salary basis' is decisive in determining whether the 'window of correction' will be available to an employer. . . . Disciplinary deductions . . . made pursuant to an established policy . . . necessarily 'indicate that there was no intention to pay the employee on a salary basis.'

To allow the 'window of correction' to apply in such a situation would lead to the unintended result that an employer who deliberately made deductions that are inconsistent with the 'salary basis' test, and is then sued as a defendant in an FLSA suit, would still be able to take advantage of the exemption. . . . This Court should reject this suggested approach, the result of which would be to rob the 'salary basis' regulation of any teeth. . . . In context the [applicable sentence of 541.118(a)(6)] can only be read to read to mean that the exemption will not be lost if

the impermissible deduction is 'inadvertent' *and* is made for reasons other than lack of work" so that 'inadvertence' is required before the 'window' may be taken advantage of. . ." at p. 36.

(14)

No. 96-857

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In The

Supreme Court of the United States

October Term, 1996

FRANCES BERNARD AUER, *et al.*,

Petitioners,

vs.

DAVID A. ROBBINS, *et al.*,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

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49 pp

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QUESTIONS PRESENTED

1. Does the Fair Labor Standards Act (29 U.S.C. § 201 *et seq.*) ("FLSA") salary basis test in 29 CFR § 541.1 and 2, as interpreted by the Secretary of Labor, apply to public agency employees?

2. Do the Secretary of Labor's interpretations of the salary basis test in 29 CFR § 541.118(a) and, more particularly § 541.118(a)(5), require the loss of salaried status when an employee is merely subject to the possibility of a disciplinary suspension of less than a week for non-safety related conduct, and should those interpretations apply to employees of a public agency engaged in law enforcement activities?

3. Should the Secretary of Labor's interpretation of the effect of an impermissible deduction from salary, 29 CFR § 541.118(a)(6), be given a meaning other than that which is plainly stated and are Respondents entitled to restore Sergeant Michael Guzy's salaried, exempt status by reimbursing him for a two (2) day suspension and committing to continue existing practice on disciplinary suspensions, if his suspension constituted an impermissible deduction from his salary?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

CONSTITUTIONAL PROVISIONS AND STATUTES AND REGULATIONS INVOLVED 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 7

I. THE SALARY BASIS TEST CANNOT BE APPLIED BECAUSE RESPONDENTS ARE IMMUNE FROM SUIT BY PETITIONERS UNDER THE FAIR LABOR STANDARDS ACT 7

II. THE DISCIPLINARY DEDUCTION COMPONENT OF THE SECRETARY OF LABOR'S SALARY BASIS TEST IS IRRATIONAL, ARBITRARY AND CAPRICIOUS AS APPLIED TO A PUBLIC EMPLOYER ENGAGED IN LAW ENFORCEMENT ACTIVITY 10

III. THERE ARE NO FACTUAL ISSUES BEFORE THE COURT INVOLVING THE SALARY BASIS TEST 15

IV. THERE IS NO EVIDENCE OF A PRACTICE OF IMPROPER SALARY DEDUCTIONS BASED ON QUANTITY OR QUALITY OF WORK 19

V. THE TWO DAY SUSPENSION OF ONE PETITIONER WAS AN ISOLATED, UNIQUE INCIDENT WHICH COULD NOT REOCCUR AND IS THE ONLY EVIDENCE OF RECORD OF AN ACTUAL SALARY DEDUCTION 21

TABLE OF CONTENTS – Continued

Page

VI. PETITIONERS' POSITION IGNORES ACTUAL PRACTICE AND DIRECTLY CONTRADICTS THE ARGUMENT MADE IN THEIR PETITION CONCERNING THE SECRETARY OF LABOR'S INTERPRETATION OF THE SALARY BASIS TEST 23

A. The Secretary Of Labor's Concurrence With The Eighth Circuit's Application Of 29 CFR § 541.118(a)(5) To The Facts Of This Case Precludes Any Argument By Petitioners To The Contrary 25

VII. THE SUSPENSION OF SERGEANT GUZY DID NOT JEOPARDIZE THE SALARIED STATUS OF ANY OTHER PETITIONER AND RESPONDENTS ARE ENTITLED TO CORRECT THE EFFECTS OF THE SUSPENSION, IF DETERMINED TO BE INCONSISTENT WITH THE SALARY BASIS OF PAYMENT .. 28

CONCLUSION 34

TABLE OF AUTHORITIES

Page(s)

CITED CASES

Adams v. State of Kansas, 919 F.Supp. 1496 (D. Kan. 1996) 10

Bowen v. American Hospital Association, 476 U.S. 610 (1986) 14

Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837 (1983) 25

Close v. State of New York, 1996 U.S.Dist. LEXIS 12330 (N.D.N.Y. 1996) 10

Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985) 11

Kaisha v. U.S. Philip's Corp., 510 U.S. 27, 114 S.Ct. 425 (1993) 10

Klein v. Rush-Presbyterian-St. Luke's Medical Center, 990 F.2d 279 (7th Cir. 1993) 30

Lee v. Flightsafety Servs. Corp., 20 F.3d 428 (11th Cir. 1994) 29

MacPherson v. University of Montevallo, 1996 U.S.Dist. LEXIS 13357 (N.D. Ala. 1996) 10

Martin v. Malcolm Pirnie, Inc., 949 F.2d 611 (2d Cir. 1991) 30, 33

McDonnell v. City of Omaha, 999 F.2d 293 (8th Cir. 1993) 11, 23

Mills v. State of Maine, ___ F.Supp. ___, 3 WH Cases 2nd 767 (D. Maine 1996) 10

Seminole Tribe of Florida v. Florida, 116 S.Ct. 1114 (1996) 9, 10, 34

Skidmore v. Swift & Co., 323 U.S. 134 (1944) 28

TABLE OF AUTHORITIES – Continued

Page(s)

STATUTES, REGULATIONS AND INTERPRETATIONS

29 U.S.C. § 201 *et seq.* i

29 U.S.C. § 202 1

29 U.S.C. § 202(a) 9

29 U.S.C. § 202(b) 9

29 U.S.C. § 203(e)(4)(A) 12

29 U.S.C. § 207(k) 12

29 U.S.C. § 207(o)(3)(A) 12

29 U.S.C. § 207(p)(3) 12

29 U.S.C. § 213(a)(1) 7, 15

29 CFR § 541.1 ..... 7, 15, 23

29 CFR § 541.1(f) 15

29 CFR § 541.118 17

29 CFR § 541.118(a) 16, 17, 20

29 CFR § 541.118(a)(5) ..... *passim*

29 CFR § 541.118(a)(6) 5, 6, 29, 30, 31, 33

29 CFR § 541.2 ..... 7, 15, 23

29 CFR § 541.2(e)(2) 15

29 CFR § 541.5d 13

29 CFR Part 553 14

29 CFR § 553.230 12

Section 84.160, R.S.Mo. 8

Section 84.160(5), R.S.Mo. 8

Sections 84.030-100, R.S.Mo. 8

CONSTITUTIONAL PROVISIONS AND STATUTES AND REGULATIONS INVOLVED

Amendment XI to the Constitution of the United States:

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.

29 U.S.C. § 202

(a) The Congress hereby finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce. ***The Congress further finds that the employment of persons in domestic service in households affects commerce.***

(b) It is hereby declared to be the policy of this Act, through the exercise by Congress of its

> power to regulate commerce among the several States and with foreign nations, to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power.

All other pertinent statutory provisions and regulations are contained in the Appendix to Petition for Writ of Certiorari and/or the Joint Appendix.

SUMMARY OF THE ARGUMENT

Initially, in deciding whether or not the FLSA salary basis test for the executive and administrative exemptions, as interpreted by the Secretary of Labor, has application to public agency employees, the Court must first consider whether federal jurisdiction exists to hear the case. Because the Board of Police Commissioners, of which Respondents were members, is by Petitioners' own description, an agency of the State of Missouri and all operations of the St. Louis Metropolitan Police Department are governed by state law, the case at bar is a suit commenced by Petitioners against a state. Jurisdiction of the federal courts was invoked under the provisions of the FLSA which was enacted pursuant to the Interstate Commerce Clause. The Eleventh Amendment bars private parties from bringing an action in federal court against a state to enforce such an Act of Congress. Therefore, regardless of the propriety of the FLSA salary basis test, this action must be dismissed for lack of jurisdiction.

Notwithstanding the jurisdictional issue, that part of the salary basis test, as interpreted by the Secretary of

Labor in 29 CFR § 541.118(a)(5), which would limit Respondents' ability to discipline otherwise exempt employees by prohibiting suspensions of less than a week under certain circumstances, at the risk of loss of salaried status, is invalid in its application. Public employers, and more specifically law enforcement agencies, are treated differently than private employers under the FLSA in numerous respects including the overtime standards. More recently, the Secretary of Labor amended the regulations to allow public employers to make deductions from employees' salaries for absences of less than a day without affecting their salaried, exempt status. This exception, which is not available to private employers, was based on the recognition of principles of public accountability. There is no rational basis for allowing deductions for a salaried employee's absences of less than a day while disallowing disciplinary suspensions of less than a full week, except for major safety rules violations.

Furthermore, the rationale for 29 CFR § 541.118(a)(5) did not take into account the importance of discipline from a public accountability standpoint in a law enforcement agency or the fact that such an agency's mission is preserving the public safety. Private employers can legitimately impose disciplinary deductions on salaried, exempt employees for violations of safety rules of major significance. A public employer whose entire function is safety related must be allowed greater flexibility than a private employer in maintaining discipline within its organization. Thus, Respondents urge the Court to find the application of 29 CFR § 541.118(a)(5) invalid in this case or to interpret it in such a way that permits Respondents to suspend exempt officers for periods of less than

a week for legitimate disciplinary reasons without jeopardizing their status as salaried employees. Rigid and arbitrary application of salary test interpretations which were never designed to apply to public law enforcement agencies cannot be and has not been justified by the Secretary of Labor or Petitioners.

Assuming *arguendo* that the Secretary of Labor's interpretations are entirely valid and applicable to Respondents, the determination that Petitioners were paid on a salary basis, based on the facts of this case, was the correct determination and should be affirmed. Attempts by Petitioners to reargue the facts are inappropriate. The record contains no evidence that a single one of the two hundred eighty-nine (289) Petitioners have actually suffered a deduction from salary due to variations in quality or quantity of work. The evidence reveals only one Petitioner was suspended for less than a full week as a disciplinary measure and that occurred only with the Petitioner's agreement as an alternative to the loss of his job, and cannot reoccur due to a change in the Disciplinary Code. Thus, there is no evidence of a practice of making improper deductions for the period from 1979 when all Sergeants and higher ranking officers were converted to the salary basis of payment by mandate of state law.

The Secretary of Labor in the Amicus Brief filed at the invitation of this Court clarified the DOL interpretation of 29 CFR § 541.118(a)(5). In so doing, the Secretary specifically concluded that the Eighth Circuit opinion correctly concluded that Petitioners, as a class, were not subject to reductions in pay for disciplinary suspensions of less than one week for violations of non-safety related

rules. The Secretary further suggested that in the circumstances of this case, one would have to ignore the realities of Respondents' compensation scheme to characterize Petitioners as hourly-paid, rather than salaried, employees.

Prior to the filing of the Amicus Brief of the United States, it was represented in the Petition for Writ of Certiorari that the Secretary of Labor's construction and interpretation of his own rules on the subject of disciplinary suspensions and their effect on the salaried status of an employee or group of employees, were not only due deference but were controlling in this case. At that time Petitioners believed the Secretary's views to be at odds with the Eighth Circuit's interpretations of 29 CFR § 541.118(a)(5) and (6). However, having received the benefit of what the Secretary termed a "clear statement" on the "correct reading" of DOL regulations which is at odds with the positions asserted by Petitioners, they have apparently changed their minds and decided that the Secretary's views should be controlling only when he shares their views.

Respondents submit that because Petitioners committed to a legal proposition in their Petition, they cannot abandon that proposition and make any credible argument to the contrary in their Brief. Petitioners, by their own statement of the law, are bound by the Secretary of Labor's expressions of the proper application of the salary basis test and his interpretations thereof, on the facts of this case. Both the Secretary and the Eighth Circuit

agree that the mere potential for a disciplinary suspension which is inconsistent with the Secretary's interpretations of the salary test will not defeat an employee's salaried status.

Not only has the Secretary concurred that two hundred eighty-eight (288) of the two hundred eighty-nine (289) Petitioners were not subject to improper disciplinary deductions, he has expressly endorsed the Eighth Circuit's fact bound holding that Respondents were and are entitled to correct the effects of the two (2) day suspension accepted by one Sergeant and preserve his salaried status. Clearly, that "deduction" was an isolated incident and not reflective of a policy or practice of improper deductions. It is equally clear that it was not made because of a lack of work and, therefore, fit squarely within the criteria of 29 CFR § 541.118(a)(6). Obviously, Respondents do not agree that the disciplinary deduction component of the interpretations of the salary basis test is or should be applicable to their exempt officers. Nor do Respondents agree that the one suspension in evidence should be interpreted as inconsistent with the salary basis of payment, particularly as applied to a law enforcement agency. Nonetheless, if this Court rules to the contrary, Respondent will reimburse the Sergeant in question for two (2) days of his bi-weekly salary and continue its existing practice by which exempt officers are not subject to disciplinary suspensions of less than a week for violations of rules which are not directly related to the safety of the general public or their fellow officers.

Petitioners are not entitled to obtain overtime compensation back to 1986 on the basis they are not salaried

employees because of one brief suspension in 1990 bargained for by the Sergeant in question, which, since 1991, could not be repeated. The mere existence of a disciplinary policy containing a range of penalties which include suspensions of less than a full week did not convert every Sergeant and Lieutenant, who are by state law salaried employees, to hourly paid employees. There must be evidence that it was the practice of Respondents to subject Petitioners to improper disciplinary suspensions, under the Secretary's interpretations, to support a legal conclusion that Petitioners are not paid on a salary basis. The record is devoid of any such evidence. To conclude otherwise would result in a legal absurdity which, in turn, would result in a windfall for Petitioners and an overwhelming and unforeseen financial liability for Respondents.

ARGUMENT

I. THE SALARY BASIS TEST CANNOT BE APPLIED BECAUSE RESPONDENTS ARE IMMUNE FROM SUIT BY PETITIONERS UNDER THE FAIR LABOR STANDARDS ACT.

The broad question presented for review in the Petition for Writ of Certiorari is whether or not the salary basis test in 29 CFR § 541.1 and 541.2 for exemption from the minimum wage and overtime requirements of the Fair Labor Standards Act (29 U.S.C. § 213(a)(1)) ("FLSA") is applicable to public employees. Without explanation, Petitioners omitted this question from their Brief and

failed to present any argument in support of an affirmative resolution of the question. Respondents submit that strict application of the salary test to the otherwise exempt executive and administrative commissioned officers of the St. Louis Metropolitan Police Department is invalid on two (2) separate grounds. First, the salary test cannot be applied at all because the facts of this case show that the Board of Police Commissioners on which Respondents served is a creation of Missouri state statute which grants to the Governor the power to appoint the members of the Board. The establishment and operation of the St. Louis Metropolitan Police Department ("Department"), including the manner in which police officers are compensated, is governed by state law. Sections 84.030-100 and Section 84.160, R.S.Mo. (Jt. App. 17-19).

Missouri law specifically prohibits the payment of any additional compensation over and above the bi-weekly salaries authorized, or compensatory time off, for overtime to any officer of the rank of Sergeant or above (Jt. App. 18; Pet. App. 6a, 43a-44a). The trial court specifically noted in its Findings and Conclusions of Law, it was assumed that "Missouri's elected representatives took care and gave great contemplation when designing a St. Louis Police Department organizational structure that would best serve a particular constituency." (Pet. App. 44a). Finally, the trial court rejected "Plaintiffs' contentions that Mo. Rev. Stat. § 84.160 and specifically Mo. Rev. Stat. 84.160(5) should be preempted by the FLSA." (Pet. App. 62a). Clearly, it was contemplated from the outset that this was a suit against the state appointed Board members to require them to discontinue their adherence

to state law and, instead, comply with Petitioners' view of the federal law as expressed in the FLSA and its implementing regulations.

That being the case, this action is, for all intents and purposes, a suit against the State of Missouri within the meaning of the Eleventh Amendment to the United States Constitution.[1] This Court held in *Seminole Tribe of Florida v. Florida*, 116 S.Ct. 1114 (1996), that the Eleventh Amendment bars Congress from authorizing private parties to bring suit in federal court against a state to enforce federal laws enacted pursuant to the Interstate Commerce Clause. The Fair Labor Standards Act was specifically enacted through the exercise of Congress' power to regulate commerce among the several states. 29 U.S.C. § 202(a) and (b). Therefore, the FLSA salary basis test could not be applied to Petitioners because the trial court lacked jurisdiction to hear their claims for overtime compensation under the FLSA.[2]

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[1] *See* Second Amended Complaint for Declaratory Judgment, Overtime Pay, Liquidated Damages and Other Relief Under the Fair Labor Standards Act in the Appendix to Respondents' Brief, pages 1-8. In Paragraph 13 thereof, Plaintiffs-Petitioners identify the Board of Police Commissioners as the "governing state agency authority for the St. Louis Police Department." In Paragraph 19, Plaintiffs-Petitioners allege that the state law prohibiting payment of overtime compensation to Sergeants and higher ranking officers is unconstitutional.

[2] Respondents specifically raised a constitutional issue in a Motion to Dismiss for Lack of Jurisdiction made during the trial (Jt. App. 94-95). Even if this jurisdictional issue is not considered to be "fairly included" within the first question presented for review in the Petition for Writ of Certiorari, this

Several federal district courts have recently concluded, based on the *Seminole Tribe* decision, that Congress did not have the authority under the FLSA to abrogate a state's Eleventh Amendment immunity and have dismissed lawsuits brought by employees against a state for lack of jurisdiction. *Adams v. State of Kansas*, 919 F.Supp. 1496 (D. Kan. 1996); *Mills v. State of Maine*, ___ F.Supp. ___, 3 WH Cases 2nd 767 (D. Maine 1996); *Close v. State of New York*, 1996 U.S.Dist. LEXIS 12330 (N.D. N.Y. 1996). *See also MacPherson v. University of Montevallo*, 1996 U.S.Dist. LEXIS 13357 (N.D. Ala. 1996). The same result must follow in this case. Consideration of the proper interpretation and application of the salary basis test to Petitioners is, therefore, unnecessary to the resolution of this case.

II. THE DISCIPLINARY DEDUCTION COMPONENT OF THE SECRETARY OF LABOR'S SALARY BASIS TEST IS IRRATIONAL, ARBITRARY AND CAPRICIOUS AS APPLIED TO A PUBLIC EMPLOYER ENGAGED IN LAW ENFORCEMENT ACTIVITY.

If Petitioners' FLSA claims are not dismissed, Respondents urge the Court to rule that possible or actual disciplinary suspensions of any of the Petitioners by the Department for periods of less than a week should not jeopardize their salaried status, regardless of the reason for the suspension. The St. Louis Metropolitan Police Department is a law enforcement agency which operates as a quasi-military organization. The trial court found it is structured in a way to enable police officers to respond

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Court is obligated to address it. *Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 114 S.Ct. 425 (1993).

effectively and rapidly to emergencies, to move quickly and decisively where force is required, and to generally set a tone of discipline and good order among the ranks (Pet. App. 41a). In the Police Manual, it is stated that the primary responsibility of the Department and each of its members is to protect the lives of the citizens they are sworn to serve (Pet. App. 105a).

Members of the Department are held to a higher standard of conduct than members of the general public. *See* Section 7.004, Standards of Conduct (Pet. App. 107a-113a). The Department cannot carry out its mission of insuring the safety of the general public in a manner which respects the rights of all persons without insuring that its officers conform to its high standards of conduct. To accomplish that, the Department must maintain discipline and the ability to do so is significantly infringed if it is effectively limited to non-salaried officers. Nor does it make sense that exempt officers in executive and administrative positions who receive a predetermined amount of compensation each pay period regardless of how many hours they work, can only be suspended as a disciplinary measure in increments of a full week.

The Eighth Circuit in *McDonnell v. City of Omaha*, 999 F.2d 293 (8th Cir. 1993), took note of the fact that there is a difference between private and public sector employees. Congress recognized, even before this Court's decision in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), that public agencies and particularly those engaged in law enforcement activities, warrant different treatment under the FLSA from private employers. One of the most significant differences is that law enforcement agencies do not have to pay overtime compensation for hours worked in excess of forty (40) in a

week. The forty (40) hour work week requirement has been the standard for private employers for more than twenty-five (25) years but recognizing basic differences in law enforcement operations, the FLSA was amended to allow public agencies operating police departments to measure overtime on work periods ranging from seven (7) to twenty-eight (28) days, rather than work weeks, based on a higher range of hours worked. 29 U.S.C. § 207(k); 29 CFR § 553.230.

Law enforcement personnel are allowed to accrue up to twice as much compensatory time than other public employees. 29 U.S.C. § 207(o)(3)(A).[3] All public employees are allowed to trade shifts with other employees, at their option, and the time worked is excluded from the calculation of hours worked for overtime purposes. 29 U.S.C. § 207(p)(3). All public employees can volunteer to do other work for a public agency. 29 U.S.C. § 203(e)(4)(A). These options are not available to private employers. Finally, as Petitioners point out, in 1992 the Secretary of Labor revised his interpretation of the salary test for public employees to allow them to have their pay docked for partial day absences, under certain circumstances, without losing their status as salaried employees (Pet. Br. 30). However, 29 CFR § 541.118(a)(5) was not open for comment as a part of that rulemaking procedure and the Secretary of Labor has yet to formally consider changes to it for public employees, despite his continuing recognition of the need

[3] Employees in the private sector cannot receive compensatory time off in lieu of cash payment for overtime worked.

to do so (Pet. App. 210a; Jt. App. 43-45). The different requirements and functions of a law enforcement agency necessitate different treatment.

In 29 CFR § 541.118(a)(5), the Secretary has interpreted the salary basis test to permit private employers to penalize, *i.e.*, discipline, otherwise exempt employees for infractions of safety rules of major significance. Such safety rules are interpreted as those relating to the prevention of serious danger to the employer's plant, or to other employees. Thus, there is an explicit recognition that disciplinary suspensions for periods of less than a week where significant safety issues are involved, are not inconsistent with the salary basis of payment. Given the importance of, and special treatment granted in, matters of safety, it requires no great leap in logic to conclude that a police department, whose entire function consists of providing for the public safety, should have greater flexibility than a private employer in disciplining functionally exempt employees. Because of the very nature of their work, the Board must insure that members of the St. Louis Metropolitan Police Department have the trust and confidence of the citizens they serve. The ability to effectively maintain discipline within the Department is clearly essential to earning the public's trust.

Having already determined that public employers can make salary deductions for partial day absences based on principles of public accountability, it makes no sense for the Secretary or this Court to prohibit law enforcement agencies from using partial week suspensions of exempt officers as a means of discipline and, in turn, public accountability. 29 CFR § 541.5d. Maintaining such a distinction is irrational, arbitrary and capricious.

Forcing Respondents to suspend exempt officers for a full week to avoid jeopardizing their salaried status, regardless of the severity of the misconduct or rules violation, makes no sense for either the officer involved or the Department.

Federal agencies such as headed by the Secretary of Labor are prohibited from interpreting and applying regulations to states which interfere with decisions typically left to local governing officials unless failure to do so would defeat the purposes of the statute being administered. *Bowen v. American Hospital Association*, 476 U.S. 610, 643-644 (1986). Congress never intended that the Secretary of Labor regulate the internal operations of state and local law enforcement agencies under the guise of the salary test for FLSA exemption. Neither eliminating the application of 29 CFR § 541.118(a)(5) to public employers like Respondents or interpreting it in such a way that permits disciplinary suspensions in increments of a day rather than a week, will undermine the salary basis test or Congressional intent that exemptions from the FLSA be narrowly construed. Significant differences exist between a private, for profit, company and a publicly funded law enforcement agency whose mission is to protect the public safety. Those differences have been recognized in 29 CFR Part 553 as noted herein. Therefore, rigid adherence to interpretations of the salary basis test designed strictly for private employers can no longer be justified.[4]

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[4] Respondents urge this Court to consider the various Amicus Briefs which have extensively and persuasively addressed these issues in Support of Respondents' position.

Respondents submit that the salary basis test cannot rationally be applied or interpreted in such a way that possible or actual disciplinary suspensions, alone, converted Petitioners to non-exempt employees.

III. THERE ARE NO FACTUAL ISSUES BEFORE THE COURT INVOLVING THE SALARY BASIS TEST.

In this case, Respondents asserted as affirmative defenses to Petitioners' claims for overtime compensation that they were exempt executive or administrative employees as such terms are defined and delimited by regulations of the Secretary of Labor. 29 U.S.C. § 213(a)(1); 29 CFR § 541.1 and 2. Because it was stipulated that all Petitioners were compensated in amounts of Two Hundred Fifty Dollars ($250.00) or more for each week they were employed at the rank of Sergeant or above, both the trial and appellate courts analyzed the exemption claims using the "short tests" in 29 CFR § 541.1(f) and 541.2(e)(2) (Pet. App. 10a-11a, 50a).

With respect to Petitioners for whom the executive exemption was claimed, all were ultimately found to have management of a customarily recognized department or subdivision of the St. Louis Metropolitan Police Department as their primary duty and, as a part of their management responsibilities, all customarily and regularly directed the work of two (2) or more other employees. With respect to those Petitioners for whom the administrative exemption was claimed, all were ultimately found to have the performance of office or non-manual work directly related to management policies or general business operations of the Department as their primary duty and that such work required the exercise of

discretion and independent judgment (Pet. App. 14a-35a). The holdings that all Petitioners met the duties tests and were functioning in *bona fide* executive or administrative capacities at all times pertinent hereto are not in dispute.

The only element of the "short tests" for the executive and administrative exemptions which remains in issue is the requirement that the Petitioners be paid "on a salary basis." The substantive dispute before the Court is limited to a single aspect of the salary basis requirement. That is, the effect of the contingent possibility of suspension for a period of less than a work week for an alleged violation of a non-safety related work rule on the salaried status of a functionally exempt executive or administrative employee.[5] While Petitioners raised various other issues in the courts below, such as partial day docking, payment of shift differential and payment of "overtime" pay in various situations, in an effort to show that they were not paid on a salaried basis, none of those issues are before this Court. Respondents are at a loss to understand why such evidence was referenced in Petitioners' Brief or the Appendix.[6] Any factual argument suggesting the existence of other indicia that Petitioners were not salaried must be ignored.

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[5] It is undisputed that an employer need not pay an employee his/her salary in a week in which he/she performs no work. 29 CFR § 541.118(a).

[6] At page 11 of the Joint Appendix, Petitioners have included what purports to be two (2) paragraphs from a Statement of Facts Not in Dispute. The heading is both misleading and inaccurate because it is nothing more than *Plaintiffs'* statement submitted prior to the trial court's summary judgment ruling on the salary test.

The regulations promulgated by the Secretary of Labor for the executive and administrative exemptions contain no requirement as to how such employees must be compensated beyond the basic specification that it be on a salary basis. Regardless of how Petitioners have characterized 29 CFR § 541.118, it is not a regulation. It is merely an interpretation of the regulations. In their Brief, Petitioners never focused on the full wording of the Secretary's interpretation of the term "salary basis" in § 541.118(a). The basic concept is expressed as follows:

> An employee will be considered to be paid 'on a salary basis' within the meaning of the regulations if under his employment agreement he regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed.

Respondents assumed the burden to prove that Petitioners were paid on a salary basis as part of their affirmative defenses.

Petitioners seem to suggest to the Court that whether or not Respondents met their burden of proof on this issue at trial, is still open to debate. The record shows otherwise. When summary judgment was granted on October 30, 1991 on the claims of Lieutenant Manuel Delgado, the trial court specifically found that "his pay scheme falls squarely within the 29 CFR § 541.118(a) definition of salaried, and there is no need to look further" (Pet. App. at 72a, footnote 3). There has never been any representation by any Petitioner that Lieutenants were paid differently than Sergeants. Thus, having ruled

on Delgado's salaried status, the trial court then turned to the Sergeants' claims and found that the only remaining issue preventing entry of summary judgment was that of the primary duty test (Pet. App. 73a-74a).

At the outset of the trial, the court confirmed that his ruling on the "salary basis" issue was the same for Sergeants as it was for Lieutenant Delgado (J.A. 67-68). At the conclusion of Respondents' case in chief, but prior to resting, the undersigned counsel reaffirmed that all Plaintiffs (Petitioners) were bound by the Court's prior ruling on the salary basis test. The Court stated "I don't think there's any question in my mind, that ruling shall remain the same." (J.A. 82-83). Because of the affirmative defenses asserted, Respondents were first to put on their evidence during the trial. Thus, the record is clear the trial court had determined prior to trial that Respondents had met their burden of proof to establish that all Petitioners were paid on a salary basis and that determination remained unchanged at the close of Respondents' evidence at trial. The Court did extend the opportunity to Petitioners to put on evidence to make a record for appeal on the ruling but the ruling never changed.[7]

Petitioners' opportunity to challenge the adequacy of the evidence supporting the trial court's holding on the salary basis test has long since passed. Complaints about

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[7] The trial court's analysis of the Missouri statute which fixes and controls the pay practices of the St. Louis Metropolitan Police Department notes that officers at the rank of Sergeant and above have been salaried since 1979 when the state legislature granted them an eight percent (8%) salary increase to offset the effects of their decision to eliminate payments or compensatory time off for "overtime hours." (Pet. App. 43a-45a).

the alleged failure of Respondents to produce witnesses at trial to testify that no Sergeant or Lieutenant had been "docked" for violating a disciplinary rule could and should have been argued by Petitioners in the trial court or at the Eighth Circuit Court of Appeals. Attempts to reargue the facts in this Court are inappropriate and improper. The only evidentiary issue even implicated by the questions presented in the Petition for Writ of Certiorari is Respondents' practice with respect to disciplinary suspensions of executive and administrative employees.

IV. THERE IS NO EVIDENCE OF A PRACTICE OF IMPROPER SALARY DEDUCTIONS BASED ON QUANTITY OR QUALITY OF WORK.

Despite their best efforts to characterize the deposition and trial testimony on the issue of disciplinary suspensions, the two hundred and eighty-nine (289) Petitioners failed to put forth one instance, over the period from 1979 through the time of trial in late 1993, whereby a Sergeant or Lieutenant suffered a reduction in salary based on the quality or quantity of work performed.[8] Instead, Petitioners argue that the evidence

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[8] At page 41 of Petitioners' Brief, in subparagraph (e), it is represented that a "second witness testifies to actual deductions." Reference is made to page 85 of the Joint Appendix to support the statement but no such testimony can be found on that page. On page 86, the testifying witness made a hearsay statement that he knew of Sergeants who have been disciplined and suspended. The witness neither identified any such Sergeant nor testified that the suspension was for a period of less than a full week, nor testified that the suspension was for

shows "as a practical matter" they are subject to improper disciplinary suspensions because of the existence of a Disciplinary Code providing various possible penalties for violations of various Departmental rules, some of which involve significant safety issues (Pet. Br. 40-43). Respondents suggest that by application of their own standard, the argument fails for lack of evidentiary support. For something to be established as a "practical matter," it must, by definition, be something that is shown to be a matter of practice, not theory. That is the essence of Respondents' position, and that of the Eighth Circuit, on this point. There was no evidence of a practice of suspending Sergeants and Lieutenants without pay for periods of less than a week for non-safety related rule violations.

In fact, the two hundred eighty-nine (289) Petitioners did not produce one witness at trial who could testify that Respondents had ever initiated a proceeding to suspend any commissioned officer at the rank of Sergeant or above for a period of less than a full week as a means of discipline for any alleged deficiency in the quantity or quality of work, whether or not a violation of the Code contained in the Department Manual. It is, therefore, entirely inaccurate and erroneous to suggest that "as a practical matter" Petitioners were subject to purportedly improper disciplinary suspensions which destroyed their status as salaried employees when no such "practice"

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violation of a non-safety related Departmental rule, let alone because of variations in quality or quantity of work. The hearsay testimony cannot even remotely be construed as evidence of an actual improper salary reduction or a practice of subjecting Petitioners to improper salary reductions in contravention of 29 CFR § 541.118(a).

could be demonstrated. The complete lack of evidence of any "practice" inconsistent with the Secretary's basic concept of payment on a salary basis, regardless of any Departmental policy, is fatal to Petitioners' argument. When all rhetoric is stripped away, the facts of record show that Petitioners' legal position is one of form over substance which would lead to an absurd result.

V. THE TWO DAY SUSPENSION OF ONE PETITIONER WAS AN ISOLATED, UNIQUE INCIDENT WHICH COULD NOT REOCCUR AND IS THE ONLY EVIDENCE OF RECORD OF AN ACTUAL SALARY DEDUCTION.

Nowhere is this lack of substance more evident than in the claim that "a representative/similarly situated witness was actually docked." (Pet. Br. 41, subparagraph (d)). The witness referred to is Sergeant Michael Guzy who was charged with violating the Department's rule requiring officers to reside within the City of St. Louis. He faced discharge in 1990 as a result. Rather than proceed to a hearing and risk the loss of his job, Sergeant Guzy struck a deal by which he agreed to accept a two (2) day suspension without pay (Pet. App. 10a). Had Respondents proceeded to discharge Sergeant Guzy as originally intended, the record would be devoid of any evidence of a disciplinary suspension for less than a week of any Petitioner or other Sergeant or higher ranking officer. Given this set of facts, the suggestion that Sergeant Guzy is in any way representative of the other two hundred eighty-eight (288) Petitioners is totally misleading and untrue.

The evidence shows this was an extraordinary and isolated incident which could not reoccur after 1991 because the Disciplinary Code was changed to provide discharge as the only possible penalty to be imposed for violation of the residency rule (Pet. App. 10a). The Eighth Circuit specifically found that Sergeant Guzy's disciplinary loss of pay occurred under "unique circumstances" and the record cannot support any other conclusion. It must also be noted that these unique circumstances did not involve a reduction in salary based on a variation in either "the quality or quantity of the work performed" by Guzy. The disciplinary action had absolutely nothing to do with the amount of time spent on the job or the manner in which Sergeant Guzy did his job, although the residency rule is obviously job related. Thus, even though the Eighth Circuit treated the two (2) day suspension as "arguably" requiring Guzy to be treated as a non-salaried employee, it can be rationally argued that it did not, given the Secretary's interpretation of the salary basis of payment.

In any event, it can certainly be persuasively argued that it is non-sensical to allow a Sergeant to strike a bargain to save his job and then use his agreement to that bargain to claim that he and all other Sergeants in the Department have not been paid on a salary basis since 1986 and are owed a windfall of millions of dollars in overtime compensation.[9] The Guzy incident is not

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[9] Even if such a claim made sense as of the time the suspension occurred, the change in the disciplinary code in 1991 to eliminate the possibility of such a suspension foreclosed any future reliance on the Guzy incident as evidence that he or others were "subject to" improper reductions in salary.

evidence of a practice by which Respondents utilized the Disciplinary Code to subject Sergeants or higher ranking officers to salary reductions for violating work rules which did not involve safety issues of significance. The record is devoid of evidence of actual deductions resulting from disciplinary suspensions initiated by Respondents for any reason. Therefore, the record will not support the conclusion urged by Petitioners that they were subject to impermissible disciplinary suspensions, "as a practical matter."

VI. PETITIONERS' POSITION IGNORES ACTUAL PRACTICE AND DIRECTLY CONTRADICTS THE ARGUMENT MADE IN THEIR PETITION CONCERNING THE SECRETARY OF LABOR'S INTERPRETATION OF THE SALARY BASIS TEST.

The core issue presented by this case for decision is whether or not the mere potential for salary reduction as a disciplinary measure destroys exempt status under 29 CFR § 541.1 and 2. Petitioners' bottom line argument is found on page 42 of their Brief in which it is claimed that as long as the employee's compensation is subject to deductions, the salary test is defeated. The Eighth Circuit rejected their claim and held:

> [T]he mere possibility of an improper deduction in pay does not defeat an employee's salaried status.

(Pet. App. 8a). In other words, the Eighth Circuit panel, relying on their prior decision in *McDonnell v. City of Omaha, Nebraska, supra*, refused to ignore what had actually occurred "in practice," or, more particularly, what

had not occurred, in determining whether Petitioners were paid on a salary basis.

Despite appellate decisions to the contrary, the Secretary of Labor has now gone on record in support of the Eighth Circuit's holding on this issue. In the Brief for the United States as Amicus Curiae on the Petition for Writ of Certiorari, filed at the invitation of this Court, the Secretary's views were expressed as follows:

> [A]n employee who is otherwise paid on a salaried basis does not lose that status simply because he is *theoretically* 'subject to' an unpaid suspension of less than one week for violating a rule that is not a major-safety rule. *Rather*, salaried status is lost under the regulations only when employees are 'subject to' such a disciplinary suspension *as a practical matter*. Thus, where no deductions have actually been made, or where there have been only isolated instances in which disciplinary suspensions have occurred, or where suspensions have occurred only under unusual circumstances, employees who are not themselves suspended do not lose their salaried status. Among the factors relevant to determining whether the exemption is lost for employees who are covered by the terms of a manual that on its face permits disciplinary suspensions of less than one week, but who have not been so suspended, are: the number and type of employees covered by the policy, the number of instances of impermissible deductions, and the circumstances surrounding those deductions, *e.g.*, whether they were idiosyncratic or reflected a more routine use of suspensions of less than one week.
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> Under the Secretary's reading of the regulations, the court of appeals correctly concluded that petitioners as a class were not subject to reduction in pay for disciplinary suspensions of less than one week for violations of rules that are not major-safety rules. While respondents' manual permits such suspensions for sergeants, only one such suspension has occurred since 1978, Br. in Opp. 13, and that suspension occurred under "unique circumstances." Pet. App. 10a. In those circumstances, it would ignore the realities of respondents' compensation scheme to characterize petitioners as hourly-paid, rather than salaried, employees.

(U.S. Amicus Br., pp. 9-11).

A. The Secretary Of Labor's Concurrence With The Eighth Circuit's Application Of 29 CFR § 541.118(a)(5) To The Facts Of This Case Precludes Any Argument By Petitioners To The Contrary.

In their Petition for Writ of Certiorari, filed prior to the Amicus Brief of the United States, Petitioners stated that the Secretary of Labor's reasonable construction of his own rules on disciplinary docking "is due deference and is controlling even if the Circuit Court's own construction were equally reasonable," citing *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1983) (Pet., pp. 16-17). They further stated that due deference "to the agency responsible for FLSA enforcement requires that the Eighth Circuit's theory does not replace DOL's interpretation of its own rules." (Pet. at p. 17). Petitioners

claimed that the Eighth Circuit's application of the disciplinary deduction "rule" was at odds with the Secretary of Labor's interpretation of his own regulations (Pet., pp. 7-8). Thus, there can be no doubt as to Petitioners' unconditional endorsement of the wisdom and weight to be afforded the Secretary of Labor's interpretations of the salary basis test. Petitioners' position is that those interpretations are not simply persuasive, they should be controlling.[10] Therefore, having received the benefit of the Secretary's views on the application of the disciplinary deduction "rule" in the Amicus Brief, which turned out to be in full accord with the Eighth Circuit decision, Petitioners must now dismiss their appeal. The Secretary's view explicitly stated at page 8 of the Amicus Brief is that the Eighth Circuit "correctly concluded that petitioners were salaried employees within the meaning of the Secretary's regulations."

Amazingly, rather than acknowledge and defer to the Secretary of Labor's "clear statement" on the "correct reading of its regulations," which they say is controlling, Petitioners suggest that the Secretary, despite his wisdom and years of experience in FLSA litigation matters, just did not understand the facts in this case (Pet. Br. at pp. 37-38, footnote 31). Petitioners then proceed to simply ignore the Secretary's statement of position, which was

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[10] Numerous references are contained in Petitioners' Brief to various actions and expressions of the Secretary of Labor's position on FLSA exemption issues pertaining to public employees as being persuasive (*See* footnotes 1-4, 11, 13, 17, 18, 30, 34 and pp. 28-34).

articulated for the very purpose of eliminating any further uncertainty on the salary basis test. Inexplicably, they have attached a compilation of previous position statements by the Secretary in briefs filed in this Court and various courts of appeals (Appendix B, pp. 3a-13a). Respondents submit that Petitioners' reliance on statements by the Secretary in prior cases, in the face of a clear statement of position and application of interpretations of the salary basis test specific to this case, defies logic, not to mention common sense (U.S. Amicus Br., pp. 14-15).

The Secretary has reviewed the facts of this case as found by the trial court and determined that Petitioners were correctly held to be salaried employees within the meaning of DOL's interpretations of the salary basis test.[11] Petitioners have represented to this Court that it must defer to the Secretary in such matters of interpretation. They cannot make any credible argument that their views should prevail over those of the Secretary because

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[11] Petitioners indicate that the Solicitor General's misunderstanding of the facts of the case can be attributed to a lack of access to the record or the Joint Appendix (Pet. Br., p. 38, fn. 31). Respondents suggest that the Solicitor General and the Secretary of Labor possessed sufficient intelligence and legal acumen to review and comprehend the decisions and opinions of the trial court and the Court of Appeals, as well as the briefs filed by the parties, from which the facts of the case could be gleaned. In any event, there could have been no misunderstanding about the fact that there was only one instance of a disciplinary suspension without pay because Petitioners cannot cite record evidence of any other such instance.

the Secretary has now interpreted the salary basis test in a manner that defeats their claims.[12]

VII. THE SUSPENSION OF SERGEANT GUZY DID NOT JEOPARDIZE THE SALARIED STATUS OF ANY OTHER PETITIONER AND RESPONDENTS ARE ENTITLED TO CORRECT THE EFFECTS OF THE SUSPENSION, IF DETERMINED TO BE INCONSISTENT WITH THE SALARY BASIS OF PAYMENT.

The Eighth Circuit held that even if the two (2) day suspension agreed to by Sergeant Guzy constituted an improper deduction, which thereby converted him to a non-salaried and, therefore, a non-exempt employee, it did not have the same effect on all other Sergeants (Pet. App. 9a-10a). The Secretary of Labor has agreed, stating:

> Because the employees other than the Sergeant were not subject to disciplinary deductions in the first place, they would retain their status as salaried employees, regardless of whether respondents exercise their option to retroactively restore the salaried status of the sergeant who was suspended.

(U.S. Amicus Br., p. 16, fn. 7).

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[12] Respondents do not agree with Petitioners to the extent that they previously believed the Secretary's interpretations of FLSA regulations were controlling. However, as this Court held more than fifty (50) years ago, the rulings, interpretations and opinions of the agency charged with FLSA enforcement constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

The Secretary's interpretation of the effect of making an impermissible salary deduction is expressed in 29 CFR § 541.118(a)(6). In the first place, the Secretary indicates that the result will necessarily depend on the facts of the particular case. However, it is further stated that:

> where a deduction not permitted by these interpretations is inadvertent, or is made for reasons other than lack of work, the exemption will not be lost if the employer reimburses the employee for such deductions and promises to comply in the future.

The one-time reduction in Sergeant Guzy's salary resulting from his suspension was not an oversight or an unintentional occurrence. Thus, it was not inadvertent. However, Guzy was not disciplined and did not suffer a loss of pay based on either the quality or quantity of his work. It had nothing to do with a lack of work. As the Eighth Circuit noted in footnote 7 of the panel's opinion:

> Because the regulation is written in the disjunctive, it is not material that the deduction from Sergeant Guzy's pay was not inadvertent, as long as it was made for reasons other than lack of work. *Lee v. Flightsafety Servs. Corp.*, 20 F.3d 428, 433 (11th Cir. 1994).

(Pet. App., pp. 9a-10a).

Petitioners suggest that for an employer to avail itself of the opportunity to correct the effects of an improper deduction, the deduction must have resulted from inadvertence *and* reasons other than lack of work. Such a reading is contrary to the plain wording of the Secretary's interpretation. As Petitioners point out, the Secretary's interpretations of the salary basis test have remained

unchanged since 1954 (Pet. Br., pp. 3-4, fn. 2). Presumably, if the interpretation on the reasons for an impermissible deduction in 29 CFR § 541.118(a)(6) was erroneously stated in the disjunctive, the Secretary would have corrected the error sometime in the last forty (40) years. Under the circumstances, the Eighth Circuit's decision applying the Secretary's interpretation as written is reasonable and rational and should not be disturbed.

There is no "accepted rule" to the contrary, as Petitioners suggest at page 44 of their Brief. In the only two (2) cases relied upon by Petitioners for the "rule," there were express policies and there was evidence of an existing practice of making salary deductions, by suspension and withholding pay, due, at least in part, to variations in quality or quantity of work. *Klein v. Rush-Presbyterian-St. Luke's Medical Center*, 990 F.2d 279 (7th Cir. 1993); *Martin v. Malcolm Pirnie, Inc.*, 949 F.2d 611 (2d Cir. 1991).[13] Neither factor is present in this case. Two hundred eighty-eight (288) of the two hundred eighty-nine (289) Petitioners have never been shown to have been subjected to a single deduction from their salaries as a disciplinary

[13] It should not go unnoticed that the *Malcolm Pirnie* case, *supra*, is the only case cited by Petitioners involving the issue of being "subject to" deductions from salary that was filed by the Secretary of Labor. It has become clear that it is private litigants who are pursuing cases such as this in hopes of obtaining windfall recoveries, whereas the agency charged with enforcement of the FLSA, to which deference is owed, has declined to assert or support the extreme legal positions urged by those litigants. More particularly, in the Amicus Brief, the Secretary has specifically advised this Court that there is no conflict between the *Malcolm Pirnie* decision and the Eighth Circuit decision in this case.

measure or because of deficiencies in the quantity or quality of their work. The circumstances of Sergeant Guzy's suspension are unique. Because of a specific change in the Disciplinary Code in 1991, neither Sergeant Guzy nor any other commissioned officer of the Department has since been subject to a suspension of less than a week for violation of the residency policy (Pet. App. 148a, Manual Reference 8.005).

Yet, Petitioners seemingly still claim that this one isolated incident which could not recur, in and of itself, was sufficient to prove that Sergeants and Lieutenants were never paid on a salary basis and should collect overtime compensation back to 1986 (Pet. Br., p. 44). In other words, all Petitioners would recover back pay for four (4) years before the Guzy suspension occurred and for the period from 1991 to the present even though the possibility of any officer being subjected to a suspension under similar circumstances has not existed since then. Nothing better demonstrates the extremity and absurdity of Petitioners' legal position in this case.[14] Petitioners have ignored the Secretary of Labor's express disagreement with their position on this issue.

Respondents submit that 29 CFR § 541.118(a)(6) is an explicit recognition that a situation can arise whereby an employer could take some action which results in a

[14] If successful for Sergeants and Lieutenants, there is no reason to believe that the same arguments will not be made to obtain overtime pay for Captains, Majors, Colonels, and even the Chief of Police, with the result being that no commissioned officer is exempt regardless of his/her duties or disciplinary experience since 1986.

deduction from an employee's salary even though it is neither intended nor expected that the action would change his/her salaried status. The Secretary has long recognized that subjecting the employer to liability for two (2) years of overtime pay just because of such an occurrence would be unfair and inequitable. Therefore, the employer is entitled to an opportunity to correct the situation, if the deduction was one that was inconsistent with the salary basis of payment, and assure that it will not reoccur. If any case fits the criteria for allowing a correction without loss of salaried status for a particular employee or employees similarly situated, it is this one.

It would be a travesty of justice to award Sergeant Guzy, not to mention two hundred eighty-eight (288) other Petitioners, years of overtime pay as if he, and the others, had been hourly paid employees, solely because Guzy negotiated and agreed to a deal that kept him from losing his job. Yet, that is what this case comes down to if the disciplinary component of the salary test is applicable to Respondents and interpreted as Petitioners suggest. Had Sergeant Guzy been discharged as originally proposed, he would have remained a salaried, exempt employee through the date of his discharge. For Guzy and the other Petitioners to now claim that because he was not fired, neither Guzy nor any of the Petitioners were ever paid on a salary basis, is patently absurd.

If the suspension is finally judged to have been an impermissible deduction which jeopardized Sergeant Guzy's salaried status, Respondents are committed to reimbursing him for the two (2) days pay. Further modifications to the Disciplinary Code in the Police Manual to reflect that commissioned officers at the rank of Sergeant

or above will not be assessed disciplinary suspensions for periods of less than a full week for non-safety related rule violations are not deemed necessary if the Eighth Circuit opinion is affirmed without modification. Respondents are willing to commit to continue their existing practice should this Court determine that the conditions of 29 CFR § 541.118(a)(5) and (6) are applicable and necessary to preserve Sergeant Guzy's salaried status. The record is devoid of evidence that any other Petitioner ever suffered the loss of even one (1) hour of pay under the existing practice, due to an impermissible deduction.

Petitioners complain that if the Eighth Circuit's ruling on this issue is affirmed, employers will deliberately initiate policies to make improper deductions from salaried employees' compensation and avoid liability if and when sued, by simply reimbursing the employees and reforming any offending portion of the policy. Of course, Petitioners have no factual basis for their cynical speculation and the premise is fundamentally flawed. The Eighth Circuit specifically held that the "window of correction" is not available to an employer who has "a settled policy of making improper deductions from compensation," citing the *Malcolm Pirnie* case, *supra* (Pet. App. 10a). Therefore, the threatened demise of the salary basis test theorized by Petitioners could not occur, as a practical matter. An employer making repeated improper deductions will, by doing so, demonstrate that in practice, employees are not paid on a salary basis.

There is no evidence in this case of any settled policy or practice of making improper deductions from the salaries of executive and administrative employees.

CONCLUSION

Under the principles of law announced in *Seminole Tribe of Florida v. Florida, supra,* Petitioners' cause of action should be dismissed for lack of jurisdiction. In the alternative, this Court should rule that the FLSA salary basis test, at least insofar as the disciplinary deduction component in 29 CFR § 541.118(a)(5) has been interpreted to apply, is irrational, arbitrary and capricious and, therefore, invalid as applied to Respondents.

Should the Court find the salary test, as interpreted by the Secretary of Labor, to be properly applied, based on the facts of this case, the Eighth Circuit decision should be affirmed.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

FRANCIS BERNARD AUER, et al.	**Case No. 88-2071-C-4**
PLAINTIFFS,	
v.	
DAVID A. ROBBINS, et al.,	
DEFENDANTS.	

SECOND AMENDED COMPLAINT FOR DECLARATORY JUDGMENT, OVERTIME PAY, LIQUIDATED DAMAGES AND OTHER RELIEF UNDER THE FAIR LABOR STANDARDS ACT

I. INTRODUCTION

1. Plaintiffs bring this action on behalf of themselves and other employees similarly situated for a declaratory judgment that the defendants have willfully and wrongfully violated their statutory obligations, and to recover back wages and liquidated damages in equal parts from the defendants for violations of the Fair Labor Standards Act (FLSA) of 1938, as amended, 29 U.S.C. Section 201, et seq.

Defendants' violations include: the institution and operation of a compensatory time system after April 15, 1986; unilateral adjustment in the administrative regulations and application of rules controlling plaintiff's

wages or fringe benefits; a failure to keep proper records as required by the FLSA; the treatment of non-exempt employees as exempt from the FLSA on the basis of rank, position or salary alone rather than through analysis of the duties and responsibilities actually performed by the employee; and improper calculations for FLSA overtime entitlement.

II. JURISDICTION

2. Jurisdiction of this action is conferred on this Court by 29 U.S.C. Section 216(b), and 28 U.S.C. Sections 1331, 1337. Declaratory relief is authorized under 28 U.S.C. Sections 2201, 2202.

3. Venue for this action lies in this Court pursuant to 28 U.S.C. Section 1391(b).

III. PARTIES

4. Plaintiff, Francis Bernard Auer, is an adult resident citizen of the City of St. Louis, employed as a law enforcement officer by the Metropolitan Police Department of the City of St. Louis, state of Missouri. Plaintiff was commissioned as a Sergeant as of December 14, 1970. Incorporated by reference is Plaintiff Auer's consent to this lawsuit, previously filed with the Court.

5. Plaintiff, Christopher James Day, is an adult resident citizen of the City of St. Louis, employed as a law enforcement officer by the Metropolitan Police Department of the City of St. Louis, state of Missouri. Plaintiff was commissioned as a Sergeant as of January 1984.

Incorporated by reference is Plaintiff Day's consent to this lawsuit. previously filed with the Court.

6. Plaintiff, James Gilbert Hall, is an adult resident citizen of the City of St. Louis, employed as a law enforcement officer by the Metropolitan Police Department of the City of St. Louis, state of Missouri. Plaintiff was commissioned as a Sergeant as of January 1984. Incorporated by reference is Plaintiff Hall's consent to this lawsuit, previously filed with the Court.

7. Plaintiffs Francis B. Carona, Anthony Pona, Michael A. Indelicato, Richard Buehler, Joseph D. Beffa, Eugene Milne, George McDonagh, Herman Ubben, James E. Long, Roy Bugdorf and Donald Swanson are sergeants employed by the St. Louis Metropolitan Police Department. Incorporated by reference are the aforementioned plaintiffs' consents to this lawsuit, previously filed with this Court.

8. Defendant David A. Robbins is a member of the City of St. Louis Board of Police Commissioners, and its acting President.

9. Defendant Rita M. Krapf is a member of the City of St. Louis Board of Police Commissioners.

10. Defendant James F. Conway is a member of the City of St. Louis Board of Police Commissioners.

11. Defendant Charles E. Misceaux is a member of the City of St. Louis Board of Police Commissioners.

12. Defendant Freeman Bosely, Jr. is a member of the City of St. Louis Board of Police commissioners.

13. The Board of Police Commissioners was created under the authority of RsMO Section 84.020 and is the governing state agency authority for the St. Louis Police Department. Said Board is an employer within the meaning of 29 U.S.C. Section 203(d).

14. The defendants and their officers and agents have violated, and continue to violate, the provisions of the FLSA by failing and refusing in a willful and intentional manner since April, 1986 to pay plaintiffs' wages due them under the FLSA and its implementing regulations. Defendants have further failed to keep records required by the FLSA, and have attempted to exempt from FLSA coverage non-exempt employees.

15. The Fair Labor Standards Act was amended in 1974 to cover virtually all state and local government activities. Those amendments were challenged as unconstitutional, and in *National League of Cities v. Usery*, 426 U.S. 833 (1976), the United States Supreme Court held them to be unconstitutional. On February 19, 1985, the Supreme Court reversed itself, and in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), held that the FLSA applies to all state and local government employees. That decision had the immediate impact of rendering illegal many of the standing wage and hour policies of defendant Board of Police Commissioners, including its use of compensatory time, its calculation of overtime entitlement, its record keeping, and its exemption from overtime of employees on the basis of rank and/or salary.

16. On November 13, 1985, the Fair Labor Standards Amendments of 1985 (Pub. Law 99-150) were enacted.

The amendments responded to many concerns raised in police administration by including special provisions in the FLSA which apply only to state and local employees.

17. Neither prior to nor during April 1, 1986, did the defendants Board of Police Commissioners take the necessary steps to comply with the new amendments before their effective date of April 15, 1986.

18. It is currently the policy of the Board of Police Commissioners to pay additional compensation for all hours of service rendered by Turnkeys, Probationary Patrolmen and Patrolmen in excess of the established regular working period. The rate of compensation is one and one half times the regular hourly rate. Further, no officer above the rank of Sergeant receives overtime compensation. The aforementioned overtime provisions are governed by RsMO Section 84.160.

19. RsMO Section 84.160(5) is unconstitutional in that it violates Article 6, clause 2 of the United States Constitution wherein the U.S. Constitution and the Laws of the United States shall be the Supreme Law of the land. More particularly, the State cannot enact a law exempting Sergeants from overtime compensation contrary to the provisions of the FLSA.

20. At no time prior to or since April 1986, has the Board instituted a time and attendance record keeping system designing to record all work time within the meaning of FLSA.

IV. CAUSE OF ACTION

21. The foregoing conduct of the defendants is in violation of the rights of plaintiffs under the Fair labor Standards Act of 1938 as amended.

V. RELIEF

WHEREFORE, plaintiffs pray that this Court:

A. Order defendants, under the supervision of plaintiffs' counsel, to make a complete and accurate accounting of all the overtime compensation due plaintiffs;

B. Enter a declaratory judgment declaring that the defendants have willfully and wrongfully violated their statutory obligations and deprived the plaintiffs of their entitlement under the law, as alleged herein;

C. Enter a judgment under Section 216 of the FLSA against defendants for all sums found due to plaintiffs in overtime compensation;

D. Award plaintiffs' monetary damages in the form of overtime compensation and liquidated damages equal to their unpaid overtime compensation plus interest;

E. Award plaintiffs' their reasonable attorney's fees to be paid by defendants, and the costs and disbursements for this action;

F. Declare RsMO Section 84.160 unconstitutional; and

G. Grant such other relief as may be just and proper.

Respectfully submitted,

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Dated: April 29, 1993

CERTIFICATE OF SERVICE

I hereby certify that on this 29 day of April, 1993 the foregoing Second Amended Complaint for Declaratory Judgment, Overtime Pay, Liquidated Damages and Other Relief Under The Fair Labor Standards Act was sent Federal Express to:

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/s/ Michael T. Leibig
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Supreme Court, U.S.
FILED
NOV 12 1996
CLERK

No. 95-897

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

FRANCIS BERNARD AUER, *et al.*,

Petitioners,

v.

DAVID A. ROBBINS, *et al.*,

Respondents.

On Writ of *Certiorari* to the United States Court of Appeals for the Eighth Circuit

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

I. THE POLICE BOARD'S BURDEN 1

The Basics of the Burden. 1

The Core Agreement Requirement. 4

II. DEFERENCE TO DOL'S FLSA REGULATIONS AND NOT TO SOLICITOR GENERAL'S FACTUAL APPLICATION . . 7

Deference to 29 C.F.R. §§541.5d and 118(a). 9

No Deference To Solicitor General's Factual Analysis. 12

III. THE ELEVENTH AMENDMENT. 13

The Board Is Not An Arm of the State. . . . 13

The Court's Financial Responsibility Test. 14

The Minority's State Control Test. 17

Immunity Waived 18

CONCLUSION 20

TABLE OF AUTHORITIES

Abbott v. United States,
Case No. 94-651c, pending (Fed. Ct. Cl.) 11

Amshey v. United States,
26 Cl. Ct. 582 (Fed. Cl. Ct. 1992) 11

Arnold v. Ben Kanowsky, Inc.,
361 U.S. 388 (1960) 2

Batterton v. Francis,
432 U.S. 416 (1977) 9

Bowen v. Georgetown University Hospital,
488 U.S. 204 (1988) 12

Celotex Corp. v. Catrett,
477 U.S. 317 (1986) 3

Chevron v. Natural Resources Defense Council, Inc.,
467 U.S. 837 (1984) 8, 9

Citicorp Indus. Credit, Inc. v. Brock,
483 U.S. 27 (1987) 2

Corning Glass Works v. Brennan,
417 U.S. 188 (1974) 2

Ford Motor Co. v. Treasury Department,
323 U.S. 460 (1945) 19

Gunter v. Atlantic C. L. R. Co.,
200 U.S. 273 (1906) 19

Hackett v. Lane County,
91 F.3d 1289 (9th Cir. 1996) 7

Hartman v. Arlington County,
720 F. Supp. 1227 (E.D. Va. 1989),
aff'd, 903 F.2d 290 (4th Cir. 1990) 7

Hess v. Port Authority Trans-Hudson Corporation,
___ U.S. ___,
115 S.Ct. 394 (1994) 13, 14, 17, 18

John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank,
___ U.S. ___, 114 S. Ct. 517 (1993) 2

Lake Country Estates v. Tahoe Planning Agency,
440 U.S. 391 (1979) 14

Martin v. Occupational Safety and Health Review Commission,
499 U.S. 144 (1991) 8

Missouri v. Zych,
642 S.W. 2d 907 (Mo. 1992) 15

Mitchell v. Lublin, McGoughy & Assoc.,
358 U.S. 207 (1959) 2

Mt. Healthy City Board of Ed. v. Doyle,
429 U.S. 274 (1977) 14, 16, 18

NLRB v. Aerospace Co. Div. of Textron,
416 U.S. 267 (1974) 10

North Haven Bd. of Ed. v. Bell,
456 U.S. 512 (1982) 10

Petty v. Tennessee-Missouri Bridge Company,
359 U.S. 275 (1959) 19

Phillips v. Walling,
324 U.S. 490 (1945) 2

Rust v. Sullivan,
500 U.S. 173 (1991) 8

Seminole Tribe of Florida v. Florida,
517 U.S. ___, 116 S.Ct. 1114, 134 L.Ed 2d 252 (1996) 13

Skidmore v. Swift and Co.,
323 U.S. 134 (1944) 8, 12

Stinson v. United States,
508 U.S. 36 (1993) 8

Toll v. Moreno,
458 U.S. 1 (1982) 19

Tony and Susan Alamo Foundation v. Secretary of Labor,
471 U.S. 290 (1985) 2

United Parcel Service v. Mitchell,
451 U.S. 50 (1981) 1

Yourman v. Guiliani,
slip op. 95-7561 (2d Cir. 1996), cert. pending, 96-152 . 7

Statutes and Other Authorities:

29 U.S.C. §213 9

29 C.F.R. § 541.5d . . . . . passim
29 C.F.R. § 541.118(a) . . . . . passim

§43.010 R.S. Mo. (1995) 18
§84.020 R.S. Mo. (1995) 17
§84.050 R.S. Mo. (1995) 17
§84.100 R.S. Mo. (1995) 18
§84.110 R.S. Mo. (1995) 18
§84.120 R.S. Mo. (1995) 18
§84.150 R.S. Mo. (1995) 18
§84.160 R.S. Mo. (1995) 15
§84.170 R.S. Mo. (1995) 18
§84.190 R.S. Mo. (1995) 15, 16
§84.210 R.S. Mo. (1995) 15
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INTRODUCTION

The central issues in the case have been thoroughly briefed.[1] The St. Louis Sergeants' and Lieutenants' ("Sergeants") reply is limited to three points: (1) the employer failed to carry its burden of proving by clear, affirmative and unmistakable evidence, that the Sergeants are exempt under any of the proposed constructions of the salary basis regulations; (2) the Department of Labor's legislative regulations and formal interpretations are due deference, but the Solicitor General's arguments on the application of those regulations to the facts are not; and (3) the Eleventh Amendment does not apply to this case.[2]

I. The Police Board's Burden.

The Board argues that this Court should reverse settled law by sustaining the holding that Sergeants are exempt and by imposing the burden of proving non-exempt status on the employee.

The Basics of the Burden. This Court long ago settled the question of whether an employer could assert entitlement to an exemption merely by treating a class of

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[1] The "window of correction" is discussed fully in the opening brief. The window should not be open after the initiation of litigation. The Police Board has not, to this day, made an unambiguous promise to comply with the application salary basis test and disciplinary docking rule in the future. Pet. Brf. at 43-45; and n. 14, below.

[2] Tenth Amendment issues addressed by *amici*, but not raised by the Respondents, are not before the Court. *See, United Parcel Service v. Mitchell*, 451 U.S. 50, 60 n.2 (1981).

employees as exempt and, thereafter, insisting that the employees bear the burden of proving they are covered. The Police Board's presumption that employees are exempt absent evidence to the contrary has things backwards. An employer may overcome the presumption of FLSA coverage only by clear, affirmative and unmistakable evidence of exempt status. *See, Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388 (1960); *Corning Glass Works v. Brennan*, 417 U.S. 188 (1974); *Citicorp Indus. Credit, Inc. v. Brock*, 483 U.S. 27, 33-35 (1987); and Pet. Brf. at 21-23.

The burden rests with the Police Board for many reasons: (1) the FLSA is a remedial statute[3]; (2) a basic canon of statutory construction dictates a narrow interpretation of statutory exemptions[4]; (3) broad FLSA coverage is essential to accomplish Congress' FLSA goals[5]; (4) the FLSA exemption claim is an affirmative defense; (5) the only explicit determination of salary status was by summary judgment in which all facts and inferences must be viewed in light most favorable to the

[3] *See, Phillips v. Walling*, 324 U.S. 490 (1945); *Mitchell v. Lublin, McGoughy & Assoc.*, 358 U.S. 207, 211 (1959).

[4] *See, John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 114 S. Ct. 517, 527-29 (1993); *Citicorp Indus. Credit, Inc. v. Brock*, 483 U.S. 27, 33-35 (1987)(FLSA); and Eskridge and Frickey, "The Rehnquist Court's Canons of Statutory Construction," 108 Harv. L. Rev. 97, 105 (1994).

[5] *Tony and Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290, 296 (1985).

Sergeants[6], and (6) the Court of Appeals' review was without trial court factual findings.

No matter how the applicable regulations are construed, the Police Board presented no evidence either at summary judgment or trial that the Sergeants were not subject to impermissible disciplinary suspension. Pet. Brf. at 6-16. [7]

Rather, the Board seeks to burden the Sergeants with an obligation to come forward with evidence that they are non-exempt. With full access to all personnel and their personnel files, the Board presented no evidence of a core §541.118(a) agreement guaranteeing no reduction in compensation. The Manual's disciplinary docking rules are not ambiguous, secret, uncommunicated, or

[6] *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

[7] The Police Board and the United States attempt to parlay a determination on summary judgment that Lieutenant Delgado was not subject to *part day docking* into a determination with regard to the disciplinary docking rule. Resp. Brf. at 17 and U.S. Brf. at 11. The district court judge made no finding that Lieutenant Delgado's compensation was guaranteed against disciplinary docking. Quite the opposite. The Court found that as a matter of fact, Manual Rule 7.004(a)(1) subjected Delgado to possible impermissible penalties. Thus, while it is technically true that Delgado was found to be "salaried" on summary judgment, that finding was in the context in which the Court also concluded as a matter of law that lack of an agreement guaranteeing non-reduced compensation and an express provision subjecting an employee to potential reductions did not endanger salary status. The district court also improperly placed the related burden on the employee. Pet. Brf. at 8 and n. 6.

hypothetical. It states expressly that all commissioned officers, including Sergeants are "subject to" offending disciplinary suspensions. All sergeants know clearly that they can and will be disciplined for the listed offenses.[8] Their compensation is not guaranteed but contingent on the avoidance of Manual violations.

The Board presented no documentary evidence of a policy or practice preventing impermissible suspensions. The Sergeants prevail even if the record were silent on the question of suspensions. In the face of the employer's telling silence, however, the employees offered significant evidence of disciplinary suspensions. That evidence is set forth in the Sergeants' opening brief at 9-16 and 41-42.[9]

The Core Agreement Requirement. The core provision of the salary basis test in 29 C.F.R. § 541.118(a) states that "an employee will be considered to

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[8] Note that the United States Brief states "if an employer effectively communicates that work violations will result in deductions of less than one week's [pay period] pay, the absence of actual deductions would not be dispositive." at 22.

[9] Like the Board, the United States and The League of Cities attempt to shift the burden of proving coverage. The United States suggests that once an employer asserts a claim of exemption, "it would be reasonable to conclude that the employer will enforce its disciplinary rules in a way which is consistent with that intent" even absent evidence that it has done so. U.S. Brf. at 25. The League suggests that "the Police department is entitled to a presumption that it will discipline in a manner that is consistent with preserving the FLSA exemption." League Brief at 24. This improperly places the burden on the employee.

be paid on a salaried basis within the meaning of the regulations if *under his employment agreement* he regularly receives" a predetermined amount of compensation "which amount is not subject to reduction..." (emphasis added.)[10] No core § 541.118(a) agreement exists. The Police Board admitted in its opposition to *certiorari* that "any Sergeant or Lieutenant was 'subject to' a deduction from his predetermined biweekly compensation" for disciplinary reasons. Resp. Opp. Cert. at 7. The Board's own Chief of Police, management witnesses, and FRCP 30(b)(6) designees testified that the Sergeants' compensation was subject to disciplinary docking. (Pet. Brf. at 41-42; Pet. App. at 102a, 217a-219a; and J.A. 13-14, 49-57, 60-64, 76 and 85-88).[11]

The regulation is so constructed that subsection (5)'s disciplinary docking and subsection (6)'s window of correction come into play only if and when an employer has a § 541.118(a) core agreement. The subsections require analysis only when an employer, despite a core agreement, makes a deduction--and then only to test whether the deduction is excuseable for safety reasons or

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[10] The Chamber of Commerce *amici* recognize the core agreement provision, but seem to claim it is not a requirement. Chamber of Commerce Brf. at 10.

[11] Both the Board and the U.S. suggest that this Court should disregard evidence in the record of actual suspensions. Such an argument should be ignored. While a party may waive an issue not raised below, a party does not waive the right to refer to evidence supporting its position on an issue raised below by failing to present an exhaustive analysis of all record evidence in a petition for *Certiorari*.

inadvertance.[12] This case never came to the point which would require full analysis of the subsections on discipline relating to safety or correction for inadvertence.[13]

The Police Board never met its burden of establishing by clear, affirmative and unmistakable evidence its affirmative defense -- indeed, it has presented no evidence -- that the Sergeants' employment agreement protects their compensation from reduction, that Sergeants were not subject to disciplinary docking for part of a pay period, or even that the Guzy deduction was unique. Conversely, the evidence demonstrates that *as a practical matter* everyone understood that Sergeants and Lieutenants were "subject to" impermissible deduction. To this day, the Police Board has never claimed, except by carefully limited, incomplete and guarded statements in appellate advocacy, that Sergeants were not subject to disciplinary suspension.[14] Without at least some evidence of an

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[12] The United States' construction of the subsections supports this construction. U.S. Brf. at 22.

[13] The United States continues to imply that the applicable provision in the Missouri Code provides an alternative to a § 541.118(a) core agreement when it provides that "St. Louis police sergeants *receive* a yearly salary." See U.S. Brief at 10. (emphasis added). However, Missouri Code § 84.160 does not provide that sergeants *shall receive* a set salary. It provides only that "the board of police commissioners *may authorize maximum amounts of compensation*" set forth in a table. (J. A. at 17.) This does not meet the core agreement requirement.

[14] The Board's counsel states that the Board will "continue its existing practice" with regard to disciplinary deductions. Resp. Br. at

agreement to such a guarantee, the Police Board's counsel cannot be heard to argue that the Board met its burden on the salary basis test.

II. DEFERENCE TO DOL'S FLSA REGULATIONS AND NOT TO SOLICITOR GENERAL'S FACTUAL APPLICATION

The Department of Labor's FLSA salary basis regulations in 29 C.F.R. §§ 541.5d and 541.118 are

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p. 6, *see also* p. 33. This is misleading. First, these statements are not followed by any cite to the record of an existing practice. Second, counsel's statements are carefully crafted to avoid stating what the "existing" practice is. Instead, at page 6, the counsel invites a new dispute over the scope of "major safety violations" and at page 33 avoids saying what the "existing practice" is to which they are committed. Counsel did state in opposition to *certiorari* that the Board's practice allowed deduction. Resp. Opp. *Cert.* at 7. Finally, these statements are undermined by the fact that all the employer would have been required to do to meet its burden is establish on the record an express policy that the employees work under an agreement which guarantees that their regular compensation is not subject to disciplinary deductions. In recent Courts of Appeals decisions, public employers demonstrated the ease of revising the policy by presenting evidence of their written policies which affirmatively state that the employees will not be subject to improper deductions. *See, Hackett v. Lane County*, 91 F.3d 1289 (9th Cir. 1996); Yourman v. Guiliani, slip op. 95-7561 (2d Cir. 1996), *cert. pending*, 96-152 (Opp. to *Cert.* at 5-6. The actual judgment against New York, which covers a four and one half year period, in the Yourman case is for less than one quarter the severely exaggerated amount New York claims it will owe each year. See, *Yourman* Opp. *Cert.* at 7, n.9.); *Hartman v. Arlington County*, 720 F. Supp. 1227, 1229 (E.D. Va. 1989), *aff'd*, 903 F.2d 290 (4th Cir. 1990); and Colorado Statute §24-50-118(3)(a) (1996) (state's change in policy cited in *amicus* brief for Wisconsin, *et al.*, State App. at 124.)

legislative regulations entitled to substantial deference. *Chevron v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).[15] A rejection of such deference would challenge the wisdom of Congress' policy choices in charging the DOL with delimiting FLSA exemptions and the wisdom of the DOL in doing so.[16] The DOL's interpretations and opinion letters are also entitled to deference under *Skidmore v. Swift and Co.*, 323 U.S. 134 (1944). If an agency applies its regulations to the facts of a case through administrative adjudication, the outcome must be sustained unless arbitrary and capricious. However, the Solicitor General's *amicus* effort to apply

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[15] As long as an "agency's interpretation of its own regulations does not violate the Constitution or a federal statute, it must be given '*controlling weight* unless it is plainly erroneous or inconsistent with the regulation.'" *Stinson v. United States*, 508 U.S. 36, 45 (1993)(string citation omitted, emphasis supplied); *see also*, *Rust v. Sullivan*, 500 U.S. 173, 186 (1991); *Martin v. Occupational Safety and Health Review Commission*, 499 U.S. 144, 150 (1991)("It is well established 'that an agency's construction of its own regulations is entitled to substantial deference.'. . . [T]he reviewing court should give effect to the agency's interpretation so long as it is 'reasonable.'") (citations omitted). The United States urges deference for these same reasons. *See*, U.S. Brf. at 16, n. 4.

[16] "When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail. In such a case, federal judges -- who have no constituency -- have a duty to respect legitimate policy choices made by those who do. The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones." *Chevron*, 467 U.S. at 866.

the salary basis regulations to the facts of this case is entitled to no deference. No DOL investigation, regulatory hearing or enforcement activity ever occurred within the St. Louis Police Department. Neither the Secretary of the Labor nor the Solicitor has special familiarity with the facts here.

Thus, the United States' support of Petitioners' position that the salary basis test and disciplinary docking rules are valid as applied to state and local government deserves substantial deference; while the United States' support of Respondents' position that the Petitioners were not subject to impermissible disciplinary deduction and that Respondents may correct the allegedly "unique and single" improper deduction *in this case* by reimbursing the affected employee and promising to comply with the salary basis rule in the future deserves no deference. *See*, United States' Motion for Divided Argument (October, 1996).

Deference to 29 C.F.R. §§ 541.5d and 118(a). Congress expressly delegated to the Secretary of Labor the authority to "define and delimit" from time to time the executive, administrative and professional exemptions (or the "white collar" exemptions) of the FLSA. 29 U.S.C. §213. As such, the DOL's regulations defining and delimiting the "white collar" exemption, including 29 C.F.R. §§ 541.5d and 118(a), must be enforced unless they are "arbitrary, capricious, or manifestly contrary to the statute." *Chevron*, 467 U.S. at 843-844. Therefore, the St. Louis Police Board's suggestion that the salary basis regulation is invalid as applied to public safety employees is wholly without merit. "A reviewing court is not free to set aside those regulations simply because it would have interpreted the statute in a different manner." *Batterton v. Francis*, 432 U.S. 416, 425 (1977); *see also*,

Chevron, 467 U.S. at 843, n.11

This Court must reject the Police Board's contention that the legislative regulation is invalid in the public sector for at least nine reasons:

1. The FLSA salary basis test is a reasonable exemption standard and effective enforcement component of the national hours of work standard. Pet. Brf. at 31-33.

2. The FLSA disciplinary docking rule is a reasonable exemption standard and a true measure of salaried status. Pet. Brf. 33-36.

3. No less than six times, Congress has considered and rejected amendments to the FLSA which would have eliminated the salary basis test from the public sector. *See, North Haven Bd. of Ed. v. Bell*, 456 U.S. 512, 535 (1982); Pet. Brf. at 27-28, n.21, n.22, and n.23.

4. In enacting the 1985 FLSA Public Sector Amendments, Congress specifically tailored the Act to public agencies, but in no way altered the long standing DOL exemption rules, including the salary basis test and the salary docking rules. This is "persuasive evidence that the interpretation is the one intended by Congress." *NLRB v. Aerospace Co. Div. of Textron*, 416 U.S. 267, 274-275 (1974); *see*, Pet. Brf. 27-28.

5. Since the 1985 FLSA Public Employee Amendments, Congress three times has amended the Act to alter the application of the salary basis test without adjusting its application to public safety employees. *See*, The Computer Programmers Provisions, P.L. 101-583, 104 Stat. 2871 (Nov. 15, 1990); The Family and Medical Leave Act, P.L. 103-3, 107 Stat. 6 (February 5, 1993); The Court Reporter Amendment, P.L. 104-26, 109 Stat. 264 (September 6, 1995); and Pet. Brf. at 26-27.

6. The same salary basis test that applies to public employees in state and local government is applied by the Federal Government to its own employees, including police sergeants in the Uniform Division of the Secret Service. *Amshey v. United States*, 26 CL. Ct. 582 (Fed. CL. C.. 1992) (the National League of Cities *amici* cite 35 Ct. CL. 358, as *vacating* the *Amshey* decision. However, only the portion of the Court's Order requiring a specific form of compliance was vacated on the basis of a settlement. The application of the original decision and the fact that Uniform Division sergeants and lieutenants are subject to the salary basis test is uncontested by the Treasury Department in currently pending Court of Claims litigation, *Abbott v. United States*, Case No. 94-651C (Judge Robert J. Yock)(Fed. CL. Ct.).

7. In 1995, Congress applied the FLSA, including the salary basis test and the disciplinary docking rule, to its own employees. The Congressional Accountability Act of 1995 (P.L. 104-1, 109 Stat.3); Pet. Brf. at 26.

8. The DOL knowingly and expressly rejected public employees' anti-disciplinary docking argument during its 1991-92 rule making process on "public accountability" of the salary basis test. 57 Fed. Reg. 37674 (August 19, 1992); Pet. Brf. at n. 24 and Pet. App. at 210a.

9. Neither the Police Board nor their *amici* supporters explain why public employers are any more likely than private employers to subject truly exempt employees to disciplinary suspensions without pay. No State Constitutional requirements or unique problems of public accountability mandate that such penalties be among the tools in public employers' disciplinary arsenal.[17]

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[17] In fact, there is an inescapable inconsistency between the argument that all public safety employees must be subject to this

No Deference To Solicitor General's Factual Analysis. The Solicitor General is entitled to no deference for his factual conclusions about a case in which the DOL is not a party, for which DOL has not been involved prior to the Supreme Court level, and for which DOL has played no role as an agency adjudicator.

When the DOL's factual interpretations are not reached as a result of an adversarial hearing proceeding, "[t]hey do not constitute an interpretation of the Act or a standard for judging actual situations which binds" the courts. *Skidmore*, 323 U.S. at 139. In fact, this Court has specifically refused to grant deference under *Chevron* "to agency litigating positions that are wholly unsupported by regulations, rulings or administrative practice." *Bowen v. Georgetown*, 408 U.S. 204, 212 (1988). Further, this Court has refused deference to the Solicitor General's interpretation enunciated in litigation because "'Congress has delegated to the administrative official and not to appellate counsel the responsibility for elaborating and enforcing statutory commands.'" *Id.* (citations omitted).

The Solicitor General is attempting to apply interpretations to facts in a tortured effort to reach a litigation position. "Deference to what appears to be nothing more than an agency's convenient litigating position would be entirely inappropriate." *Bowen*, 488 U.S. at 213. The Solicitor's entire factual argument should be ignored.

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particular form of discipline and the Police Board's claim that it does not subject sergeants to it.

III. THE ELEVENTH AMENDMENT.

This is not a case in which the Court should address the Eleventh Amendment. The Police Board asserts for the first time that it is not subject to suit in federal court. Contrary to the Board's claim, *Seminole Tribe of Florida v. Florida*, 517 U.S. ___, 116 S. Ct. 1114 (1996) does not hold that federal courts have no jurisdiction in a case such as this. The Police Board is not a State Government within the meaning of the Eleventh Amendment. This case does not invoke the specter of federal court jurisdiction or control over the treasury of one of the 50 states. The Sergeants are not "citizens of another state or a foreign government" within the meaning of the Eleventh Amendment. If immunity is at issue, it is not the developing Eleventh Amendment variety, but more traditional Article III immunity. The Sergeants seek a judgment solely against the Police Board. The Police Board waived immunity.

The Board Is Not An Arm of the State. In support of their claim that the true party in interest is Missouri, the Police Board points to (a) the amended complaint's statement that it is the "governing state agency authority for the St. Louis Police Department," (b) the Missouri Code provision that establishes the Board, and (c) the Governor's power to appoint the members of the Board. Resp. Brf. at 7-10. However, these are insufficient to confer "State" status for Eleventh Amendment purposes.

This Court has consistently held that the Eleventh Amendment does not deprive the federal courts of jurisdiction over suits against political subdivisions. "[C]ities and counties do not enjoy Eleventh Amendment immunity." *Hess v. Port Authority Trans-Hudson Corp.*,

115 S. Ct. 394, 404 (1994). This is true even though political subdivisions exercise a "slice of state power." *Lake Country Estates v. Tahoe Planning Agency*, 440 U.S. 391, 401-02 (1979). *See, also, Mt. Healthy City Board of Ed. v. Doyle*, 429 U.S. 274, 280-81 (1977); *County of Lincoln v. Luning*, 133 U.S. 529 (1890).

The Court's Financial Responsibility Test.

Political subdivisions are protected by the amendment only if a money judgment against them would have the same consequence as a judgment against the State itself. This is the holding of *Hess*. In that case, this Court expressly rejected the two arguments made by the Board here: That the Board is an arm of the State because (1) it is created by State law, and (2) the Governor appoints its members. As this Court pointed out, "ultimate control of every state-created entity resides with the State, for the State may destroy or reshape any unit it creates. '[P]olitical subdivisions exist solely at the whim and behest of their State,' yet cities and counties do not enjoy Eleventh Amendment immunity." *Hess*, 115 S.Ct. at 404 (citations omitted). "[R]endering control dispositive," this Court reasoned, "does not home in on the impetus for the Eleventh Amendment: the prevention of federal court judgments that must be paid out of a State's treasury." *Id.*

Notably absent from the Police Board's brief is any discussion of financial responsibility. The Missouri Code rests financial responsibility for the police department, not with the State, but with the City of St. Louis. The Police Board must "pass upon all claims presented against them for the expenses incurred in the discharge of their duties. . . and such claims and salary rolls. . . *shall be duly audited and paid by the proper disbursing officer or officers of said cities. . . out of any moneys in the city treasury...*"

§84.210 R.S. Mo. (1995) (emphasis added). The Code further provides that "[i]t is the duty of the municipal assembly or common council of the cities to make the necessary appropriation for the expenses of the maintenance of the police force in the manner herein provided. . . ." §84.160 R.S. Mo. (J.A. at 18). The Board must prepare an annual estimate of expenses to provide to the City. The City is "required to set apart and appropriate the amount so certified, payable out of the revenue of said cities. . . " [18] Once the appropriation is made, the Board does *not* have the authority to transfer funds appropriated for one line item to another without the prior approval of the Municipal Board of Estimate and Apportionment. §84.210 R.S. Mo. (1995). Finally, the Board is vested with the authority to provide themselves with offices, furniture and employees as well as to adopt a common seal. The fiscal responsibility for these items is not a burden of the State, but is the responsibility of the City. If the Mayor or Council "refuse to set aside and appropriate the revenue necessary to carry out the

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[18] A state court has ruled that the Board is a "state agency" for the purposes of the Hancock Amendment, State Constitutional Amendment 21, (Missouri's version of unfunded mandate protection). The Amendment provides that once the Board certifies its budget for the year, if the city refuses to fund the budget for "new activities" certified by the Board, the Board may not sue the city. *Missouri v. Zych*, 642 S.W. 2d 907 (Mo. 1992). Nothing in this ruling detracts from the Code provisions mandating the city treasury as responsible for funding the police department, its salaries and claims against it. All that is prevented is the Board's creating unfunded mandates for the city. The Hancock Amendment does not open the state treasury to demands resulting from employee compensation judgments against the Board. The *Hess* Court recognized the Port Authority was not a State agency for Eleventh Amendment purposes, despite state court rulings describing it as a state agency. 115 S. Ct. at 403.

provisions of section 84.010 to 84.340," the Board may apply to the circuit court to compel City appropriations. §84.190 R.S. Mo. (1995).

On summary judgment, the trial judge noted that the Board is "solely financed by a municipality." (Pet. App. at 69a). The trial judge clearly recognized that the City and not the State would be responsible for any judgment. See Post-Trial Hearing Trans. at 7, 19, 38-39, and 49; see also testimony of the Board's Deputy Chief and a F.R.C.P. 30(b)(6) designee. (J.A. at 70 and 82).

In the *Hess* case, the Port Authority did receive some of its funding from the State, but the Court found there was no statutory requirement that the state fund the Authority as it was structured to be self-sustaining. In *Mt. Healthy City Board of Ed. v. Doyle*, 429 U.S. 274 (1977), this Court also refused to find the Board an arm of the State although it received "a significant amount of money from the State." *Id.* at 280. Looking to the governing statutes on balance, the Court found that it was more like a county or city despite from where the revenues came. Similarly, as discussed below, even if the State treasury point is left aside, on balance, the Missouri Code reveals that the Board operates as an independent entity answering on occasion to the City and never to the State. It functions much more like a City than an arm of the State.

Here, however, there is no evidence of any monies coming from the State. Under the statutory framework, any judgment in this case will not be paid out of the State treasury. Thus, under this Court's holding in *Hess*, the Board is not entitled to Eleventh Amendment immunity.

The Minority's State Control Test. It is not necessary to rest solely on the "State Treasury" factor to find that the Police Board is not an arm of the State. The Police Board fairs no better under the control test. Justice O'Connor, writing for the dissent, stated that the appropriate test is the degree of control the State retains in oversight of the entity. *Hess*, 115 S. Ct. at 411 (O'Connor, J., dissenting; (emphasis added)). The dissent pointed to the fact that the Governors appointed the members in *Hess*, that the Governors had veto power over the decisions of the Port Authority, that the Port Authority was required to report annually to the State legislatures and that the State legislatures were required to approve changes in any rules or new projects. *Id.* at 411-12.

In this case, the Governor of Missouri appoints four of five members of the Board. However, that is where the State control ends. The State Code mandates the basic authority for the Board. Neither the State legislature nor the Governor have control or oversight over the operation of the Board. Neither the Governor nor the State legislature have veto or approval power over any decisions of the Board.

The creation of, and authority of, the Board falls under the heading "Cities, Towns and Villages" in the Missouri Code. The Board is comprised of five members. The fifth is the Mayor of St. Louis. §84.020 R.S. Mo. (1995). The Board, and not the Governor, determine who shall be President, and each officer of the Board. *Id.* The Board determines who the Treasurer will be. The Treasurer can only be removed from that position by the Board. §84.050 R.S. Mo. (1995). The Code expressly states that the Board is authorized to declare emergencies and that its authority "shall not be subject to review by

any other power." §84.110 R.S. Mo. (1995). Similarly, the Board is vested with the exclusive authority to remove a police officer. §§84.120 and 84.150 R.S. Mo. (1995). The Board has the authority to hire police officers in excess of the number authorized by statute with the approval of the Municipal Board of Estimate and Apportionment. §§84.100 and 84.150 R.S. Mo. (1995). The Board has the exclusive authority to make all rules and regulations necessary for the "appointment, employment, uniforming, discipline, trial and government of the police." §84.170 R.S. Mo. (1995). Moreover, the State has its own police force whose salaries are set in accordance with other state employees. See, §§43.010-030 R.S. Mo. (1995).[19]

The Board was created in the Progressive Era to address muckraker's exposure of corruption by politicians within the City Police Department. The reformer's goal was to take politics, whether at the State or City level, out of policing. Direct citizen, not State Government, control was the progressive reform model.[20] Suit against the members of the St. Louis Police Board of Commissioners cannot be construed as an "affront to the dignity" of Missouri. *Hess* 115 S.Ct. at 401 and 406.

Immunity Waived. The St. Louis Police Board members have waived any immunity. The Board admitted jurisdiction of the federal district court in its answers to

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[19] The legislature has created a similar board in the Kansas City Police Department. §84.360 R.S. Mo. (1995). *See, Mt. Healthy*, 429 U.S. at 280.

[20] Morrison and Commanger, "Progressism in Politics," Growth of the American Republic (1961) at 470.

the complaint and amended complaint. Obviously, mere appearance to defend a case does not waive immunity or prevent this Court from reviewing the matter. *Ford Motor Co. v. Treasury Department*, 323 U.S. 460, 467 (1945). However, the Police Board members have done more than fail to raise the issue in the lower courts. The Board expressly conceded jurisdiction of the federal courts in this case.

The Board initially filed a Motion to Dismiss for Lack of Jurisdiction which complained of lack of jurisdiction to hear claims against Board members in their individual capacity. It expressly "concede[d] the jurisdiction of this Court to hear the claims stated by Plaintiffs under the FLSA against them in their official capacities as members of the Board of the Police Commissioners."

In as much as the Police Board appeared in Federal Court and affirmatively pled that there was jurisdiction to hear a case against the Board members in their official capacity, they have waived any immunity claim that may have attached. [21] *See, Gunter v. Atlantic C. L. R. Co.*,

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[21] Immunity is also waived when the state appears in federal court and consents to court orders awarding damages or other retroactive relief if its position on the merits is rejected by the court. *Toll v. Moreno*, 458 U.S. 1, 17-18 (1982); *see also*, Rotunda and Nowak, *Treatise on Constitutional Law Substance and Procedure*, §2.12 (West Publishing, 1996). As the Board stated in the Eighth Circuit and most recently to this Court it is "committed to reimbursing [Guzy] for the two (2) days pay" if the courts finally judge the Police Board to have violated the law. Res. Brf. at 32. Similarly, the Police Board stipulated to a Consent Judgment against it in the trial court of $9,248. (Aug. 1994).

200 U.S. 273 (1906); *Petty v. Tennessee-Missouri Bridge Company*, 359 U.S. 275 (1959).

CONCLUSION

For all of the foregoing reasons, this Court should reverse the judgment below.

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In the Supreme Court of the United States

OCTOBER TERM, 1996

FRANCIS BERNARD AUER, ET AL., PETITIONERS

v.

DAVID A. ROBBINS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING AFFIRMANCE

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35 pp

QUESTIONS PRESENTED

Regulations promulgated by the Secretary of Labor provide that employees are considered to be paid on a "salary basis," and therefore may be "executive," "administrative," or "professional" employees exempt from the overtime requirements of the Fair Labor Standards Act of 1938, 29 U.S.C. 201 *et seq.*, if they are paid a predetermined amount, on a weekly or less frequent basis, that "is not subject to reduction because of variations in the quality or quantity of the work performed." 29 C.F.R. 541.118(a). In addition, 29 C.F.R. 541.118(a)(6) provides a "window of correction" under which an employer that has made a deduction from an employee's pay that would remove the employee from exempt status may retroactively restore the employee's exempt status by reimbursing the employee and promising to comply with the salary basis rule in the future. The questions presented are:

1. Whether the pay of a class of employees is "subject to" reduction within the meaning of 29 C.F.R. 541.118(a) when an employer has a written manual that permits disciplinary suspensions of less than one week to be imposed on members of the class, but no such suspension has ever been imposed except in one unique circumstance.
2. Whether an employer may take advantage of the window of correction to remedy a one-time disciplinary deduction.

TABLE OF CONTENTS

	Page
Interest of the United States	1
Statement	1
Summary of argument	13
Argument:	
I. The salary basis test, including its disciplinary deduction rule, is a reasonable exercise of the Secretary of Labor's authority to define the Section 13(a)(1) exemption	16
II. Petitioners were not "subject to" impermissible disciplinary deductions within the meaning of 29 C.F.R. 541.118(a)	21
III. The window of correction is open to respondents to correct the single improper disciplinary deduction in this case	27
Conclusion	29

TABLE OF AUTHORITIES

Cases:

Abshire v. *County of Kern*, 908 F.2d 483 (9th Cir. 1990), cert. denied, 498 U.S. 1068 (1991)	17
Batterton v. *Francis*, 432 U.S. 416 (1977)	16
Brock v. *Claridge Hotel & Casino*, 846 F.2d 180 (3d Cir.), cert. denied, 488 U.S. 925 (1988)	17
Garcia v. *San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985)	8
Jackson v. *Kentucky*, 892 F. Supp. 923 (E.D. Ky. 1995), appeals pending, Nos. 95-6283 & 95-6284 (6th Cir.)	20
Kinney v. *District of Columbia*, 994 F.2d 6 (D.C. Cir. 1993)	17
Martin v. *Malcolm Pirnie, Inc.*, 949 F.2d 611 (2d Cir. 1991), cert. denied, 506 U.S. 905 (1992)	12, 28
Martin v. *OSHRC*, 499 U.S. 144 (1991)	16

Cases—Continued: Page

Maryland v. *Wirtz*, 392 U.S. 183 (1968) 8
McGuire v. *City of Portland*, 91 F.3d 1293 (9th Cir. 1996) 20
Meringolo v. *City of New York*, 908 F. Supp. 160 (S.D.N.Y. 1995) 21
Merrill Lynch, Pierce, Fenner & Smith, Inc. v. *Curran*, 456 U.S. 353 (1982) 19
Mourning v. *Family Publications Serv., Inc.*, 411 U.S. 356 (1973) 18
Mueller v. *Reich*, 54 F.3d 438 (7th Cir. 1995), petition for cert. pending, No. 95-586 20
National League of Cities v. *Usery*, 426 U.S. 833 (1976) 8
Paulitz v. *City of Naperville*, 781 F. Supp. 1368 (N.D. Ill. 1992) 21
Sullivan v. *Zebley*, 493 U.S. 521 (1990) 16
Walling v. *Yeakley*, 140 F.2d 830 (10th Cir. 1944) 17

Statutes and regulations:

Education Amendments of 1972, Pub. L. No. 92-318, § 906, 86 Stat. 375 8
Fair Labor Standards Act of 1938, 29 U.S.C. 201 *et seq.* 1
§ 3(d), 29 U.S.C. 203(d) 8
§ 3(e)(2)(C), 29 U.S.C. 203(e)(2)(C) 18
§ 3(x), 29 U.S.C. 203(x) 8
§ 7(a)(1), 29 U.S.C. 207(a)(1) 1
§ 7(k), 29 U.S.C. 207(k) 18
§ 13(a)(1), 29 U.S.C. 213(a)(1) ..... *passim*
§ 16(b), 29 U.S.C. 216(b) 11
Fair Labor Standards Amendments of 1966, Pub. L. No. 89-601, § 102, 80 Stat. 831-832 7-8
Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, 88 Stat. 55 8
Fair Labor Standards Amendments of 1985, Pub. L. No. 99-150, 99 Stat. 787:
§§ 2-4, 99 Stat. 787-790 8
§§ 2-5, 99 Stat. 787-790 19
§§ 2-7, 99 Stat. 787-791 ..... 8, 19
§ 5, 99 Stat. 790 8

Statutes and regulations—Continued: Page

29 C.F.R.:
Pt. 541 ..... 4, 5, 8, 11, 16
Subpt. A 16
Section 541.1 (1938 Supp.) 2
Section 541.1 ..... 2, 9
Section 541.1(e) (1940 Supp.) 3
Section 541.1(f) (1949 Supp.) 5
Section 541.2 (1938 Supp.) 2
Section 541.2 ..... 2, 9
Section 541.2(a) (1940 Supp.) 4
Section 541.2(e) (1949 Supp.) 5
Section 541.3 ..... 2, 9
Section 541.3(b) (1940 Supp.) 4
Section 541.3(e) (1949 Supp.) 5
Section 541.5d 9, 20, 25
Subpt. B 5, 16
Section 541.118 (1949 Supp.) 5
Section 541.118 16
Section 541.118(a) 2, 5, 6, 10, 11, 14, 18, 21, 22, 25, 26
Section 541.118(a)(2) 7, 23
Section 541.118(a)(3) 7, 23
Section 541.118(a)(4) 7
Section 541.118(a)(5) 6, 23
Section 541.118(a)(6) 7, 12, 15, 23, 28, 29
Pt. 553:
Section 553.32(c) 8
Section 553.201 18

Miscellaneous:

3 Fed. Reg. 2518 (1938) 2
5 Fed. Reg. 4077 (1940) 3, 4
14 Fed. Reg. (1949):
p. 7705 5
p. 7735 6
19 Fed. Reg. (1954):
p. 1322 6
pp. 1321-1322 16
p. 1321 6

Miscellaneous—Continued: Page

pp. 4405-4406 6
p. 4406 6
56 Fed. Reg. (1991):
pp. 45,824-45,826 ..... 9, 19
p. 45,825 9
57 Fed. Reg. (1992):
p. 37,666 ..... 9, 17
pp. 37,666-37,677 19-20
p. 37,667 10
p. 37,668 9
p. 37,672 ..... 9, 10
pp. 37,672-37,673 20
p. 37,674 ..... 10, 20
p. 37,677 9
S. Rep. No. 159, 99th Cong., 1st Sess. (1985) 19
United States Dep't of Labor, Wage and Hour Division, *"Executive, Administrative, Professional . . . Outside Salesman" Redefined, Report and Recommendations of the Presiding Officer at Hearings Preliminary to Redefinition* (1940) ..2, 3, 17
United States Dep't of Labor, Wage and Hour Division, Release No. A-9 (Aug. 24, 1944) 4, 5
United States Dep't of Labor, Wage and Hour and Public Contracts Division, *"Report and Recommendations on Proposed Revisions of Regulations, Part 541, Defining the Terms "Executive" "Administrative" "Professional" "Local Retailing Capacity" "Outside Salesman"* (1949) 5, 17, 18
United States Dep't of Labor, Wage and Hour and Public Contracts Divisions, *"Report and Recommendations on Proposed Revision of Regulations, Part 541, under the Fair Labor Standards Act Defining the Terms "Executive" "Administrative" "Professional" "Local Retailing Capacity" "Outside Salesman"* (1958) 7
United States Dep't of Labor, Wage and Hour Division, Wage & Hour Manual (BNA):
(cum. ed. 1944-1945) 4
Salary Basis (Dec. 24, 1991) 29

In the Supreme Court of the United States

OCTOBER TERM, 1996

No. 95-897

FRANCIS BERNARD AUER, ET AL., PETITIONERS

v.

DAVID A. ROBBINS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING AFFIRMANCE

INTEREST OF THE UNITED STATES

The Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 201 *et seq.*, contains an exemption from its overtime requirements for "employee[s] employed in a bona fide executive, administrative, or professional capacity." 29 U.S.C. 213(a)(1). This case raises questions concerning the interpretation of regulations issued by the Secretary of Labor pursuant to his authority to "define[] and delimit[]" (*ibid.*) the meaning of those terms. The Secretary has a substantial interest in the correct interpretation of his regulations. At the invitation of the Court, the United States filed a brief as amicus curiae at the petition stage.

STATEMENT

1. Section 7(a)(1) of the FLSA, 29 U.S.C. 207(a)(1), requires an employer to pay each of its employees "at a rate not less than one and one-half times the regular rate

at which he is employed" for all hours worked in excess of 40 hours in a week. Section 13(a)(1) of the Act, 29 U.S.C. 213(a)(1), provides an exemption from the requirement of overtime pay for "any employee employed in a bona fide executive, administrative, or professional capacity * * * (as such terms are defined and delimited from time to time by regulations of the Secretary [of Labor])."

Pursuant to the authority conferred on the Secretary to define the scope of the exemption, the Secretary has promulgated regulations that provide that, in order to qualify for executive, administrative, or professional status, an employee must meet both a salary test and a duties test. See 29 C.F.R. 541.1 (executive), 541.2 (administrative), 541.3 (professional). The salary test consists of two elements: (1) a requirement that the "exempt" employee receive no less than a specified level of compensation; and (2) a requirement that the compensation be paid "on a salary basis." This case concerns only the latter component of the salary test: whether the pertinent employees have been paid "on a salary basis" as defined by 29 C.F.R. 541.118(a).

a. The salary basis test has roots that reach back to the enactment of the FLSA in 1938. In that year, the Administrator of the Department of Labor's Wage and Hour Division issued regulations providing that, in order to come within the Section 13(a)(1) exemption, executive and administrative employees must perform duties of a specified nature and be "compensated for [their] services at not less than $30 * * * for a workweek." 29 C.F.R. 541.1 (1938 Supp.); 3 Fed. Reg. 2518 (1938). A salary requirement was not initially imposed for professional employees. 29 C.F.R. 541.2 (1938 Supp.); 3 Fed. Reg. 2518 (1938).

In 1940, the Wage and Hour Division conducted hearings on the regulations governing the Section 13(a)(1) exemption, and the presiding hearing officer issued a report recommending a salary basis test for all three classes of exempt employees. United States Dep't of Labor, Wage

and Hour Division, "*Executive, Administrative, Professional . . . Outside Salesman" Redefined, Report and Recommendations of the Presiding Officer at Hearings Preliminary to Redefinition* (1940) (*1940 Report*). In that report, the presiding hearing officer noted that there was "surprisingly wide agreement" among employers and employees "that a salary qualification in the definition of the term 'executive' is a valuable and easily applied index to the 'bona fide' character of the employment." *Id.* at 19. The basis of that agreement was that "[t]he term 'executive' implies a certain prestige, status, and importance" that is captured by a salary test. *Ibid.* Also, because "executive" employees are denied the protection of the Act, "[i]t must be assumed that they enjoy compensatory privileges," including a salary "substantially higher" than the minimum wages guaranteed under the Act. *Ibid.* The report noted that "[t]he shortest pay period which can properly be understood to be appropriate for a person employed in an executive capacity is obviously a weekly pay period," and it recommended a salary test for executives that would be satisfied if "the employee is guaranteed a net compensation of not less than $30 a week '*free and clear.*'" *Id.* at 23 (emphasis added). The report also concluded that the inclusion of a salary test was vital in defining "administrative" and "professional" employees as well. *Id.* at 26 ("[A] salary criterion constitutes the best and most easily applied test of the employer's good faith in claiming that the person whose exemption is desired is actually of such importance to the firm that he is properly describable as an employee employed in a bona fide administrative capacity."); *id.* at 36 ("[I]n order to avoid disputes, to assist in the effective enforcement of the act and to prevent abuse, it appears essential * * * to include a salary test in the definition [of professional].").

Based on the presiding officer's recommendation, the Wage and Hour Division Administrator promulgated regulations providing that an exempt executive must be "compensated for his services *on a salary basis* at not less than $30 per week." 29 C.F.R. 541.1(e) (1940 Supp.); 5

Fed. Reg. 4077 (1940) (emphasis added). The regulations required that exempt administrative and professional employees (except physicians and attorneys) must be paid "*on a salary* or fee *basis* at a rate of not less than $200 per month." 29 C.F.R. 541.2(a) (administrative), 541.3(b) (professional) (1940 Supp.); 5 Fed. Reg. 4077 (1940) (emphasis added).

b. In 1944, the Wage and Hour Division issued Release No. A-9, which addressed the meaning of "salary basis." The Release stated that an employee will be considered to be paid on a salary basis if

> under his employment agreement he regularly receives each pay period, on a weekly, biweekly, semimonthly, monthly or annual basis, a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the number of hours worked or in the quantity or quality of the work performed during the pay period.

Release No. A-9 (Aug. 24, 1944), *reprinted in* Wage & Hour Manual (BNA) 719 (cum. ed. 1944-1945). The Release further explained that, because "bona fide executive, administrative, and professional employees are normally allowed some latitude with respect to the time spent at work," such employees should generally be free to go home early or occasionally take a day off without a deduction in pay. *Ibid.* Due to particular war-time conditions, however, "disciplinary deductions * * * made for unreasonable absences" were permissible. *Ibid.*

In 1947, the Wage and Hour Division again conducted hearings on the Part 541 regulations. After the hearing, the presiding officer recommended retention of the "salary basis" test, stating:

> The evidence at the hearing showed clearly that bona fide executive, administrative, and professional employees are almost universally paid on a salary or fee basis. Compensation on a salary basis appears to have been almost universally recognized as the

> only method of payment consistent with the status implied by the term "bona fide" executive. Similarly, payment on a salary (or fee) basis is one of the recognized attributes of administrative and professional employment.

United States Dep't of Labor, Wage and Hour and Public Contracts Divisions, *Report and Recommendations on Proposed Revisions of Regulations, Part 541, Defining the Terms "Executive" "Administrative" "Professional" "Local Retailing Capacity" "Outside Salesman"* 24 (1949) (*1949 Report*) (footnote omitted).

The 1949 Report (at 24-26) recommended abandoning the policy in Release No. A-9 that permitted disciplinary deductions for unreasonable absences. The imposition of such disciplinary deductions, the presiding officer concluded, had been a war-time phenomenon prompted by temporary conditions that no longer existed. *Id.* at 25. In the "rare instances" where discipline of exempt employees was still found necessary, it was "usually accomplished in other ways than by deduction from salary." *Ibid.*

Based on the presiding officer's recommendations, the Administrator in 1949 issued revised Part 541 regulations that retained the "salary basis" criterion. 29 C.F.R. 541.1(f), 541.2(e), 541.3(e) (1949 Supp.); 14 Fed. Reg. 7705 (1949). Shortly thereafter, the Administrator published the first version of 29 C.F.R. 541.118 (1949 Supp.) in a new Subpart B, entitled "Interpretations." Section 541.118(a) provided as follows:

> An employee will be considered to be paid on a salary basis within the meaning of the regulations in Subpart A of this part, if under his employment agreement he regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the number of hours worked in the workweek or in the quality or quantity of the work performed. The employee must receive his full salary

> for any week in which he performs any work without regard to the number of days or hours worked.

14 Fed. Reg. 7735 (1949). Those regulations did not expressly authorize any deductions from compensation.

c. In 1954, the Administrator issued a revised Section 541.118(a) that remains in force today. That regulation was adopted after being proposed for comment, see 19 Fed. Reg. 1321 (1954), and was issued pursuant to the Administrator's authority under Section 13(a)(1) of the Act, see *id.* at 4405-4406. As in the 1949 regulation, an employee is deemed to be paid on a salary basis if, under the employment agreement, the employee "regularly receives * * * a predetermined amount" of compensation that "is not subject to reduction because of variations in the quality or quantity of the work performed." 29 C.F.R. 541.118(a). A "salary basis" employee "must receive his full salary for any week in which he performs any work without regard to the number of days or hours worked," but need not be paid for any week in which he performs no work. *Ibid.* The new version of Section 541.118(a), however, added exceptions to that rule. One exception is that an employer may impose penalties for infractions of safety rules of major significance without affecting an employee's salaried status. 29 C.F.R. 541.118 (a)(5). The proposed version of the new regulation would have permitted deductions for "other major disciplinary reasons" as well. 19 Fed. Reg. 1321, 1322 (1954) (proposed Section 541.118(a)(5)). "On the basis of the comments" received, however, the Administrator deleted from the final regulation the authorization of deductions for other major disciplinary reasons. *Id.* at 4406. Penalties for infractions of work rules that are not major safety rules are therefore governed by the general salary basis test set forth in paragraph (a). Thus, an employee suspended without pay for less than one week for a violation of a rule that is not a major safety rule would be classified as nonsalaried. On the other hand, an otherwise salaried employee who is suspended without

pay for one full week for the violation of such a rule would remain a salaried employee.

The salary basis regulation also permits deductions from a salaried employee's compensation to reflect absences of "a day or more" for personal reasons other than sickness and accident (29 C.F.R. 541.118(a)(2)) and to reflect absences for "a day or more" due to sickness or disability if "made in accordance with a bona fide plan, policy or practice of providing compensation for loss of salary occasioned by both sickness and disability" (29 C.F.R. 541.118(a)(3)). Docking an exempt employee's pay for partial-day absences, however, is not permitted.[1]

The regulation further provides, in a subsection commonly referred to as the "window of correction," that an employer who has made a deduction that runs afoul of the salary basis rule may take corrective action to restore retroactively the employee's exempt status. 29 C.F.R. 541.118(a)(6) (quoted in full at p. 23, *infra*).[2]

2. a. As originally enacted, the FLSA did not apply to state employees. In 1966, and again in 1972, Congress extended FLSA coverage to certain state employees. Fair Labor Standards Amendments of 1966, Pub. L. No.

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[1] Deductions may not be taken for employee absences caused by jury duty, attendance as a witness, or temporary military leave. The employer may, however, offset against an employee's salary any amounts received by the employee for performance of those duties. 29 C.F.R. 541.118(a)(4).

[2] In 1958, the Wage and Hour Division again conducted hearings on the Section 13(a)(1) exemption for the purpose of determining whether the salary levels in the regulations should be changed. Although the presiding officer's report related primarily to the salary levels, he reiterated that salary is a "mark of [the] status" of an exempt employee and reaffirmed the criterion's importance as an enforcement tool, noting that the Labor Department had "found no satisfactory substitute for the salary tests." United States Dep't of Labor, Wage and Hour and Public Contracts Divisions, *Report and Recommendations on Proposed Revision of Regulations, Part 541, under the Fair Labor Standards Act Defining the Terms "Executive" "Administrative" "Professional" "Local Retailing Capacity" "Outside Salesman"* 2, 3 (1958).

89-601, § 102, 80 Stat. 831-832 (hospitals, institutions, schools, and railways or carriers); Education Amendments of 1972, Pub. L. No. 92-318, § 906, 86 Stat. 375 (public preschools). In *Maryland* v. *Wirtz*, 392 U.S. 183 (1968), this Court upheld the constitutionality of the 1966 extension.

In 1974, Congress extended FLSA coverage to nearly all public sector employees. Fair Labor Standard Amendments of 1974, Pub. L. No. 93-259, 88 Stat. 55; see 29 U.S.C. 203(d) and (x). This Court held, however, that the FLSA's minimum wage and overtime provisions could not constitutionally be applied to state employees engaged in traditional governmental activities. See *National League of Cities* v. *Usery*, 426 U.S. 833, 852 (1976). Approximately ten years later, *National League of Cities* was overruled by *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985).

In response to *Garcia*, Congress amended the FLSA to address particular concerns of state and local governments and to allow them relief from liability during a temporary adjustment period. Fair Labor Standards Amendments of 1985, Pub. L. No. 99-150, §§ 2-7, 99 Stat. 787-791. The 1985 amendments contained special provisions on compensatory time in lieu of overtime, special details, and volunteers. *Id.* §§ 2-4, 99 Stat. 787-790. They also contained an exemption for employees of the legislative branch of States and their political subdivisions. *Id.* § 5, 99 Stat. 790. The 1985 amendments, however, did not make any changes to either the Section 13(a)(1) exemption or to the Secretary's Part 541 regulations implementing the exemption. The Department's regulations implementing the 1985 amendments thereupon expressly made the Part 541 regulations applicable to state and local governments. 29 C.F.R. 553.32(c).

b. In light of its experience, the Department of Labor has taken a series of steps that address the application of the salary basis test to public employers. In January 1987, the Department issued an enforcement policy, stating that the Wage and Hour Division would not generally deny a Section 13(a)(1) exemption for an otherwise

exempt public employee whose pay was reduced for absences of less than a day, if such reductions were required by state or local law. See 57 Fed. Reg. 37,666, 37,668 (1992) (quoting policy). In September 1991, the Department issued an interim final rule providing that public employees could qualify as exempt under Section 13(a)(1) even if they are subject to pay deductions for periods of less than a day due to personal reasons, illness or injury when no leave is available. 56 Fed. Reg. 45,824-45,826 (1991). The rule was prompted by the Department's recognition that public employers are often required by principles of public accountability to reduce pay for partial-day absences. *Id.* at 45,825. That interim rule became effective immediately, without notice and comment, in order to spare public employers from "potentially enormous and generally unexpected back wage liabilities" to employees who would otherwise be exempt. *Ibid.*

In August 1992, after notice and comment, the Department issued a final regulation, 29 C.F.R. 541.5d, which provides that a public employee who otherwise meets the salary basis test shall not be disqualified from exemption under 29 C.F.R. 541.1, 541.2 or 541.3 on the ground that the employee "is paid according to a pay system established by statute, ordinance, or regulation, or by a policy or practice established pursuant to principles of public accountability * * * which requires the public agency employee's pay to be reduced or such employee to be placed on leave without pay for absences for personal reasons or because of illness or injury of less than one work-day" under specified circumstances. See 57 Fed. Reg. 37,677 (1992). The effect of the regulation is to preserve the exemption in most circumstances in which the salary of state and local executive, professional, or administrative employees is required to be reduced for partial-day absences. In issuing that new regulation, the Secretary noted that, while executive, administrative, and professional employees in the private sector are nearly always paid on a salary basis, *id.* at 37,672, public employers are normally subject to "principles of public ac-

countability" that prohibit paying employees for time not worked, *id.* at 37,667. The Secretary also recognized that, if the partial-day absence rule were applied to the public sector, it could prevent state and local governments from availing themselves of the overtime pay exemption for executive, administrative, and professional employees, a result that would be inconsistent with Congress's intent. *Id.* at 37,672. The Secretary therefore exempted public employees from the partial-day absence rule.

At the same time, however, the Department retained in effect for state and local employees the general rule governing disciplinary deductions in 29 C.F.R. 541.118 (a), under which an employee loses salary basis status if the employee's pay is reduced for disciplinary suspension (other than for violation of a major safety rule) of less than a week. 57 Fed. Reg. 37,674 (1992). The Department concluded that the comments it had received had not provided a "sufficient basis" for determining "that public employers are significantly more restricted in the availability of options with respect to employee discipline than private employers." *Ibid.* The Department noted that both public and private employers had disciplinary options consistent with the Section 13(a)(1) overtime pay exemptions, such as termination, official reprimands, demotions, and reassignment or restriction of duties. *Ibid.*

3. Petitioners are a group of police sergeants and one police lieutenant employed by the St. Louis Police Department. Pet. App. 6a, 36a. During the pertinent time frame, state law has provided that St. Louis police sergeants receive a yearly salary and has specified that officers at the rank of sergeant or higher are allowed no overtime pay. *Id.* at 6a & n.1, 43a-46a.

The St. Louis Board of Police Commissioners has issued a Police Manual that specifies standards of conduct for police officers. Pet. App. 102a, 107a-117a. The penalties for violating some of those standards include disciplinary suspensions of less than one week without pay. See, *e.g.*, *id.* at 148a (penalty for first offense of "[f]ailing to properly patrol assigned beat" is "[r]eprimand to 5 days").

Three of the petitioners brought this action in 1988 against respondents, the members of the St. Louis Board of Police Commissioners, alleging that respondents denied them overtime compensation in violation of the FLSA. Pet. App. 6a, 36a-37a. Respondents asserted that petitioners were administrative or executive employees within the meaning of Section 13(a)(1), and are therefore exempt from the FLSA's overtime requirements. *Id.* at 37a. Eventually, 285 other sergeants and one lieutenant were added as party plaintiffs under Section 16(b) of the FLSA, 29 U.S.C. 216(b).

Although much of the litigation focused on whether the employees at issue performed administrative or executive duties within the meaning of the Part 541 regulations, petitioners also contended they were not paid on a salary basis within the meaning of 29 C.F.R. 541.118(a). On cross motions for partial summary judgment, the district court ruled that the sole petitioner who was a lieutenant performed primarily management duties, that he was a salaried rather than an hourly employee, and that there were issues of disputed fact as to whether sergeants met the duties component of the test for executive or administrative employees. Pet. App. 6a-7a, 71a-74a. The court therefore held that the lieutenant petitioner was exempt under Section 13(a)(1), *id.* at 73a, and that the case should proceed to trial on the question whether sergeants satisfied the duties component of the test for executive or administrative employees, *id.* at 74a.

After trial, the district court ruled that 20 categories of sergeants were exempt under Section 13(a)(1) and two categories of sergeants were partially exempt. Pet. App. 6a-7a, 47a-62a, 64a-65a. The district court's post-trial opinion did not discuss whether sergeants were paid "on a salary basis" within the meaning of the Secretary's regulations.

4. The court of appeals affirmed in part and reversed in part, holding that all categories of sergeants were exempt under Section 13(a)(1). Pet. App. 1a-35a. In a portion of its decision that petitioners do not challenge,

the court of appeals held that all sergeants performed primarily administrative or managerial duties, thereby satisfying the duties component of the Section 13(a)(1) exemption. *Id.* at 10a-35a.

The court of appeals also rejected petitioners' argument that they were not salaried employees because they could be disciplined by suspension without pay for periods of less than one week under respondents' disciplinary policy for violations of rules that are not safety rules of major significance. The court held that "[t]he mere possibility of an improper deduction" from pay does not defeat an employee's salaried status under the Secretary's regulations. Pet. App. 8a.

The court of appeals also ruled that petitioners were exempt employees notwithstanding that respondents had suspended one sergeant for two days without pay for violating a residency requirement. Because a residency requirement is not a safety rule of major significance, the court concluded that the sergeant's suspension without pay was inconsistent with the Secretary's salary basis regulation and "[a]rguably" required that the sergeant be treated as a nonsalaried employee. Pet. App. 9a. The court concluded, however, that such a one-time improper deduction did not mean that *all* sergeants should be considered nonsalaried. *Ibid.*

The court stated that the "window of correction" regulation, 29 C.F.R. 541.118(a)(6), permits an employer who makes an improper deduction in an employee's salary to retain the exemption when the improper deduction is a "'*one-time* or unintentional failure to adhere to § 541.118(a)'s requirements.'" Pet. App. 9a (quoting *Martin* v. *Malcolm Pirnie, Inc.*, 949 F.2d 611, 616 (2d Cir. 1991), cert. denied, 506 U.S. 905 (1992) (emphasis added by court below)). The court determined that, although the window is not available when an employer has a settled policy of making improper deductions from compensation, the sergeant's disciplinary loss of pay in this case had not been made pursuant to an established policy. *Id.* at 9a-10a & n.7. The court explained that

the sergeant initially faced the penalty of termination, which would not have altered his exempt salaried status, and that respondents agreed to the lesser penalty of suspension as part of an agreement in which the sergeant waived his right to a hearing. *Id.* at 10a. The court also noted that respondents had changed their policy to make termination the exclusive penalty for violations of the residency requirement, so that respondents in the future would not impose pay deductions as a penalty for violations of the rule. The court concluded that, in those circumstances, the regulations "simply require the employer to reimburse the employee for the lost wages." *Ibid.*[a]

SUMMARY OF ARGUMENT

I. The Fair Labor Standards Act of 1938 (FLSA) contains an exemption from its overtime requirements for executive, administrative, and professional employees. The salary basis test and the disciplinary deduction component of that test fall within the Secretary of Labor's statutory authority to define the scope of the exemption. The salary basis test provides that exempt employees must generally receive a guaranteed weekly salary. The test is reasonable in light of evidence that executive, administrative, and professional employees are nearly universally paid on that basis. The rule against disciplinary deductions of less than one week's pay is an integral component of the test, since employees who are subject to such deductions do not have a guaranteed weekly salary and do not have the status and prestige associated with bona fide executive, administrative, and professional employees.

When Congress extended the FLSA to state and local employees, it added special amendments to accommodate the concerns of state and local governments. It did not,

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[a] Because it held that petitioners were exempt salaried employees within the meaning of the Secretary's regulations, the court of appeals stated that it did not need to address the question whether the no-disciplinary-deduction condition on salary basis status is valid as applied to the public sector. Pet. App. 8a n.6.

however, alter either the Secretary's salary basis test or the disciplinary deduction component of that test. Congress also left intact the Secretary's authority to define the scope of the exception. The Secretary has reasonably exercised that authority. After conducting a rulemaking proceeding and receiving evidence that principles of public accountability often prohibit public employers from paying employees for time not spent on the job, the Secretary reasonably decided that the general prohibition under the salary basis test against deductions for partial-day absences should not apply to state and local governments. The evidence in the rulemaking proceeding did not show, however, that there was a comparable need to modify the disciplinary deduction aspect of the rule. Public employers have a wide range of disciplinary options, such as reprimands, restrictions on duties, and full-week suspensions, that do not run afoul of the salary basis rule. The Secretary therefore reasonably decided not to modify the principles governing disciplinary deductions.

II. Petitioners were not "subject to" disciplinary deductions of less than one week's pay within the meaning of the first sentence of 29 C.F.R. 541.118(a). An employee who is otherwise salaried does not lose his exempt status simply because he is theoretically subject to improper disciplinary deductions; salaried status is lost only when employees are subject to improper disciplinary deductions as a practical matter. That approach best furthers the purposes of the exemption because it realistically assesses whether an employer treats a class of employees as having the status and guaranteed pay that the salary basis test measures.

Because the test is a practical one, the most important evidence bearing on whether a class of employees is "subject to" improper deductions would concern the extent to which such deductions have actually occurred and the circumstances of those deductions. Where an employer effectively communicates to employees in a particular category that deductions will be made for disciplinary suspensions of less than one week, a showing of actual deductions

would not be necessary. In the usual case, however, actual experience is the best measure of whether a class of employees is "subject to" improper deductions.

Under the correct interpretation of the regulations, petitioners were not subject to improper disciplinary deductions. Although respondents' written policy manual facially authorizes improper deductions, respondents' personnel rules can all be enforced in ways that are consistent with the disciplinary deduction aspect of the salary basis rule. For example, personnel rules that authorize a penalty ranging from reprimand to a suspension of five days can be enforced by imposing either the minimum or the maximum penalty without running afoul of the prohibition against disciplinary deductions of less than one week's pay. When public employers have otherwise manifested an intent to treat a class of employees as bona fide salaried employees, it ordinarily would be reasonable to conclude that they will enforce their disciplinary code in a manner that is consistent with that intent.

The one concrete example cited by petitioners of a suspension of less than one week involved a unique situation in which respondents implemented a two-day suspension only as a result of a settlement with the employee. That unique situation does not show that the entire class of sergeants was subject to improper disciplinary deductions as a practical matter. The rest of the anecdotal evidence relied on by petitioners was not brought to the attention of the court of appeals or to this Court at the certiorari stage, and there is therefore no occasion for this Court to consider it.

III. Respondents can correct the single disciplinary deduction of less than one week's pay by satisfying the terms of the "window of correction" regulation. 29 C.F.R. 541.118(a)(6). The window of correction is not open when an employer engages in a pattern of improper deductions. The window is open, however, to correct a one-time deduction of less than one week's pay. Respondents have not yet fulfilled all the conditions for invoking the window of correction. But once the case returns to

the district court, respondents can do so by reimbursing the one sergeant whose salary was reduced and promising to comply with the Secretary's salary basis regulations in the future.

ARGUMENT

I. THE SALARY BASIS TEST, INCLUDING ITS DISCIPLINARY DEDUCTION RULE, IS A REASONABLE EXERCISE OF THE SECRETARY OF LABOR'S AUTHORITY TO DEFINE THE SECTION 13(a)(1) EXEMPTION

Section 13(a)(1) of the FLSA exempts from the Act's overtime compensation requirements "any employee employed in a bona fide executive, administrative, or professional capacity * * * (*as such terms are defined and delimited from time to time by regulations of the Secretary of Labor*, subject to the provisions of [the Administrative Procedure Act])." 29 U.S.C. 213(a)(1) (emphasis added). The Secretary's regulations setting forth such definitions and delimitations must be upheld so long as they are not arbitrary, capricious, or manifestly unreasonable. *Sullivan* v. *Zebley*, 493 U.S. 521, 528 (1990); *Batterton* v. *Francis*, 432 U.S. 416, 425-426 (1977).[4]

Pursuant to Congress's broad grant of authority to "define[] and delimit[]" the scope of the exemption, the Secretary's regulations have for more than 50 years provided that an employee must be paid on a salary basis in order to come within the exemption. For more than 40 years, the regulations have contained the disciplinary deduction component of that rule, which provides that, to be

[4] Although the "salary basis" test (29 C.F.R. 541.118) appears in the "interpretations" subpart (Subpart B) of Part 541, rather than the "general regulations" subpart (Subpart A), that placement does not affect the level of deference owed to the rule. Section 541.118 was promulgated pursuant to notice and comment rulemaking in accordance with the statutory authorization in Section 13(a)(1). See 19 Fed. Reg. 1321-1322 (1954). Moreover, an agency's "power authoritatively to interpret its own regulations is a component of [its] delegated lawmaking powers." *Martin* v. *OSHRC*, 499 U.S. 144, 151 (1991).

regarded as salaried, an employee must receive a predetermined salary that is not "subject to" deductions of less than one week's pay for violations of work rules that are not major safety rules. Those aspects of the Secretary's regulations constitute a reasonable exercise of the Secretary's authority to "define[] and delimit[]" the scope of the exemption from the FLSA's overtime requirements.

A. As we have explained, based on evidence submitted at hearings conducted by the Wage and Hour Division, the Secretary determined that executive, administrative, and professional employees are nearly universally paid on a salary basis. See 57 Fed. Reg. 37,666 (1992) (describing history of salary basis regulations); *1949 Report* 24. That nearly universal practice reflects the widely held understanding that employees with the requisite status to be bona fide executives, administrators, or professionals have discretion to manage their time and are not answerable for the number of hours worked or the number of tasks performed. See *Kinney* v. *District of Columbia*, 994 F.2d 6, 11 (D.C. Cir. 1993); *Brock* v. *Claridge Hotel & Casino*, 846 F.2d 180, 184 (3d Cir.), cert. denied, 488 U.S. 925 (1988). Such employees are not paid by the hour or task, but for the general value of services performed. *Abshire* v. *County of Kern*, 908 F.2d 483, 486 (9th Cir. 1990), cert. denied, 498 U.S. 1068 (1991). In general, they receive a guaranteed amount of compensation "free and clear." See *1940 Report* 23. The Secretary's regulations therefore reasonably provide that, in order to fall within the exemption, employees must be paid on a "salary basis"—*i.e.*, with limited exceptions, they must be guaranteed a predetermined amount of compensation that is not reduced because of the quantity or quality of work. See *Walling* v. *Yeakley*, 140 F.2d 830, 832-833 (10th Cir. 1944).

The rule against disciplinary deductions is an integral component of the salary basis rule. Because one of the marks of an exempt employee is the receipt of a predetermined amount of compensation, the Secretary reasonably decided that suspending an employee for violation

of a work rule, and docking the employee's pay for the suspension, is an indication that the employee lacks the requisite status to qualify for exemption under Section 13(a)(1). The disciplinary deduction rule is also based on the Secretary's understanding, derived from Wage and Hour Division hearings, that bona fide executive, administrative, and professional employees have sufficiently high status and prestige that they are not generally disciplined in the form of such deductions from compensation. *1949 Report* 24-26.[5]

B. The Secretary has acted within his statutory authority in applying the salary basis rule and the disciplinary deduction component of that rule to state and local employers. When Congress extended the coverage of the FLSA to almost all public employees, it sought to accommodate the special concerns of state and local governments. Congress specifically exempted from overtime requirements certain categories of state and local government employees, such as elected officials, their personal staff, and certain of their appointees and advisers. See 29 U.S.C. 203(e)(2)(C). Congress also created special overtime rules for law enforcement personnel, who need not be paid premium overtime compensation until they have worked 171 hours over a period of 28 days. 29 U.S.C. 207(k); 29 C.F.R. 553.201.

After this Court's decision in *Garcia*, Congress amended the FLSA to accommodate still further "the particular

[5] The line-drawing contained within the disciplinary deduction rule is itself reasonable. Cf. *Mourning* v. *Family Publications Serv., Inc.*, 411 U.S. 356, 374 (1973) (lines drawn by agency in defining a class subject to regulation may include "reasonable margin" to ensure effective enforcement). The Secretary permits deductions from the compensation of executive, administrative, and professional employees for violations of major safety rules as an accommodation to the strong public policy interests in compliance with such rules. The Secretary does not consider unpaid disciplinary suspensions of a full-week pay period to violate the salary basis rule, because the Secretary has adopted a general policy, reflected in 29 C.F.R. 541.118(a), not to question the salaried status of an employee who receives no pay in a week in which the employee performs no work.

needs and circumstances of the States and their political subdivisions." S. Rep. No. 159, 99th Cong., 1st Sess. 7-8 (1985); see Fair Labor Standards Amendments of 1985, Pub. L. No. 99-150, §§ 2-7, 99 Stat. 787-791. In particular, Congress deferred the effective date of certain provisions of the FLSA; it added new provisions on compensatory time in lieu of overtime, special details, and volunteers; and it added an exemption for employees of the legislative branch of States and their political subdivisions. *Id.* §§ 2-5, 99 Stat. 787-790.

While Congress has carefully attended to the special problems faced by state and local governments, it has not modified either Section 13(a)(1) or the Secretary's salary basis test. Indeed, nothing in the text or legislative history of the FLSA's extension to state and local government employees—or in the 1985 amendments—even remotely suggests that Congress intended to prohibit the Secretary from implementing the Section 13(a)(1) exemption with the same salary basis test and disciplinary deduction rule that it had long applied to the private sector. The absence of any such indication is significant, because the applicable regulations were promulgated before Congress's extension of the FLSA to state and local employees. See *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U.S. 353, 379 (1982) (Congress is presumed to be aware of published regulations when it extends a statute). The Secretary therefore retains his full authority under Section 13(a)(1) to "define[] and delimit[] from time to time" the terms bona fide executive, administrative, and professional employee, as they apply to the public sector.

C. In exercising that authority, the Secretary has been sensitive to the possibility that differences between the public and private sectors might call for differences in the way in which the salary basis test should be applied to those two sectors. In 1991 and 1992, in response to concerns raised by state and local governments, the Secretary exempted public employers from the partial-day absence component of the salary basis rule. 56 Fed. Reg. 45,824-45,826 (1991); 57 Fed. Reg. 37,666-37,677

(1992); 29 C.F.R. 541.5d. The Secretary determined that principles of public accountability often prohibit public employers from paying employees for time not worked, and that applying the partial-day absence rule to such employers would inappropriately prevent them from availing themselves of the Section 13(a)(1) exemption for executive, administrative, and professional employees. 57 Fed. Reg. 37,672-37,673 (1992).

The evidence before the Secretary during the rulemaking proceeding, however, did not establish a comparable need for a change in the disciplinary deduction rule as applied to the public sector. 57 Fed. Reg. 37,674 (1992). There was no evidence presented to the Secretary that public accountability principles require public sector employers to impose particular forms of discipline, such as unpaid suspensions of less than one week for minor infractions, and that the salary basis regulation therefore should be modified accordingly. *Ibid.* Indeed, the Secretary noted that public employers have a wide range of options for implementing discipline that would allow them to preserve the exemption for particular classes of employees. *Ibid.* For example, nothing in the disciplinary deduction rule precludes public employers from sanctioning violations of work rules through reprimands, temporary reassignment of duties, full-week suspensions, or termination. As those examples illustrate, state and local employers remain free to enforce a system of graduated sanctions for their employees' job-related misconduct without running afoul of the disciplinary deduction rule.

The Secretary did not rule out an eventual change in the disciplinary deduction rule. 57 Fed. Reg. 37,674 (1992). He reasonably concluded, however, that the case for a change had not been made in that proceeding. The disciplinary deduction rule is therefore valid as applied to the public sector. *McGuire* v. *City of Portland*, 91 F.3d 1293, 1295-1296 (9th Cir. 1996); *Mueller* v. *Reich*, 54 F.3d 438, 443 (7th Cir. 1995), petition for cert. pending, No. 95-586 (filed Oct. 10, 1995); *Jackson* v. *Kentucky*, 892 F. Supp. 923, 933 (E.D. Ky. 1995), appeals pending, Nos. 95-6283 & 95-6284 (6th Cir., docketed Sept.

27, 1995); accord *Meringolo* v. *City of New York*, 908 F. Supp. 160, 168-169 (S.D.N.Y. 1995); *Paulitz* v. *City of Naperville*, 781 F. Supp. 1368, 1372 n.8 (N.D. Ill. 1992).

II. PETITIONERS WERE NOT "SUBJECT TO" IMPERMISSIBLE DISCIPLINARY DEDUCTIONS WITHIN THE MEANING OF 29 C.F.R. 541.118(a)

Petitioners were paid a predetermined amount every two weeks, and the district court found that there was no police department procedure for deducting pay from a sergeant or higher-ranking officer on an hour-by-hour basis because that employee did not work a certain number of hours. Petitioners nonetheless contend that they were non-salaried employees within the meaning of the Secretary's regulations, because they were "subject to" improper disciplinary deductions and therefore "subject to reduction because of variations in the quality or quantity of the work performed" within the meaning of the first sentence of 29 C.F.R. 541.118(a).

A. As we explained in our brief at the petition stage (at 9-10), in the Secretary's view, an employee who is otherwise paid on a salaried basis does not lose that status simply because he is theoretically "subject to" improper disciplinary deductions. Rather, salaried status is lost under the regulations only when employees are "subject to" such disciplinary deductions as a practical matter. In other words, either such deductions must actually be made in practice, or there must be a significant likelihood that, if an employee violates the pertinent work rules, the employee will be disciplined in a manner inconsistent with the salary basis rule.

That approach best furthers the purposes of the exemption because it realistically assesses whether an employer treats a class of employees as having the status and guaranteed pay that the "salary basis" test measures, and therefore as being "bona fide" executive, professional, or administrative employees. While petitioners appear to have advanced a different view before, they now agree (Br. 38) that it is only when employees "*as a practical*

matter are subject to impermissible disciplinary suspensions" that an employer's compensation practices run afoul of Section 541.118(a)'s disciplinary deduction rule.

B. Because the test is a practical one, the most important evidence bearing on whether a class of employees is "subject to" improper deductions would concern the extent to which such deductions have actually occurred and the circumstances of those deductions. On the one hand, for example, when there is evidence that improper deductions have been taken with some frequency for violations of a work rule by employees having a particular rank, it is fair to conclude that all employees in that rank are "subject to" such deductions. On the other hand, when such deductions have not occurred or have only occurred in idiosyncratic or unusual circumstances, that conclusion generally would not be warranted. See Brief for the United States as Amicus Curiae 9-10. In addition, if an employer effectively communicates that work-rule violations will result in deductions of less than one week's pay, the absence of actual deductions would not be dispositive. In those circumstances, the employees may be, as a practical matter, "subject to" improper deductions. In the usual case, however, actual experience will be the best measure of whether a class of employees is "subject to" improper deductions within the meaning of the first sentence of Section 541.118(a).[6]

C. The remainder of the salary basis regulation supports that construction of the first sentence of Section 541.118(a). The second sentence of Section 541.118(a) elaborates on the rule specified in the first sentence. It provides that, "[s]ubject to [certain specified] exceptions * * *, the employee must *receive his full salary* for any

[6] Because this case involves only a single documented deduction, it is not necessary to decide the extent to which actual deductions must occur in order to conclude that a class of employees is "subject to" deductions. Nor is it necessary to decide the extent to which an employer must inform his employees that work-rule violations will result in deductions of less than one week's pay in order to conclude that a particular class of employees is "subject to" improper deductions.

week in which he performs any work without regard to the number of days or hours worked" (emphasis added). That portion of the regulation focuses directly on the pay that an employee actually receives. The same is true of the exceptions to the "full salary" requirement. For example, Section 541.118(a)(2) provides that "[d]eductions *may be made* * * * when the employee absents himself from work for a day or more for personal reasons, other than sickness or accident" (emphasis added). Section 541.118(a)(3) provides that "[d]eductions *may also be made* for absences of a day or more occasioned by sickness or disability" (emphasis added). And Section 541.118(a)(5) provides that "[p]enalties *imposed* in good faith for infractions of safety rules of major significance will not affect the employee's salaried status" (emphasis added).

The "window of correction" regulation, 29 C.F.R. 541.118(a)(6), confirms the importance of actual deductions in deciding whether employees are paid on a salary basis. That regulation provides:

> The effect of making a deduction which is not permitted under these interpretations will depend upon the facts in the particular case. Where deductions are generally made when there is no work available, it indicates that there was no intention to pay the employee on a salary basis. In such a case the exemption would not be applicable to him during the entire period when such deductions were being made. On the other hand, where a deduction not permitted by these interpretations is inadvertent, or is made for reasons other than lack of work, the exemption will not be considered to have been lost if the employer reimburses the employee for such deductions and promises to comply in the future.

The "window of correction" regulation addresses the effect of actual deductions on salaried status, and it makes clear that such deductions result in a loss of the exemption when they demonstrate that the employer has no intent to pay its employees on a salaried basis, and, there-

fore, to treat them as "bona fide" executive, professional, or administrative personnel. That regulation is necessarily premised on the understanding that actual deductions (and any corrections thereof) ordinarily determine exempt status.

D. In the court below, and in their petition to this Court, petitioners relied on two things to show that employees in the rank of sergeant were "subject to" disciplinary deductions: respondents' police manual and the disciplining of a single sergeant. Neither is sufficient to show that the entire class of sergeants was "subject to" disciplinary deductions.

1. Respondents' policy manual facially authorizes the imposition of improper disciplinary deductions, *i.e.*, deductions of less than one week's pay for violations of work rules that are not major safety rules. Pet. App. 142a, 147a-149a (listing the penalty for various violations as reprimand to five days). But as petitioners themselves now appear to recognize, a written manual authorizing improper deductions, without more, does not show that the class of employees facially covered by the policy is "subject to" such deductions. Petitioners give one example of why that is so: a rule that is still on the books may not be enforced at all. Pet. Br. 43. But there are other reasons as well. For example, a personnel rule, although broadly worded, may not have been intended for application to a particular category of employees, and analysis of actual deductions will make it clear that the rule is not applied to them. Just as a written description of an employees' duties is not controlling in deciding whether those employees have executive, administrative, or professional duties, a written personnel manual is not controlling in deciding whether employees are subject to disciplinary deductions.

More significant, a personnel rule typically does not *require* a particular sanction for a violation of a rule; instead, it usually gives discretion to those who administer

the policy to decide upon the appropriate sanction.[7] As previously discussed (p. 10, *supra*), work rules can be enforced in a variety of ways that would not render a class of employees non-salaried. For example, reprimands, temporary reassignment of duties, full-week suspensions, and termination are all consistent with the disciplinary deduction rule. When those who administer a disciplinary policy decide that a violation of a work rule should be enforced against a particular class of employees in one of those ways (or not at all), rather than through disciplinary deductions of less than one week's pay, the class of employees would not be "subject to" improper disciplinary deductions.

Those who administer the policy may enforce a work rule without imposing disciplinary deductions of less than one week's pay, because they believe that different enforcement mechanisms work better for different classes of employees. They may also decide that it is more important to retain the exempt status of a particular class of employees than it is to enforce the work rule through the sanction of less than one week's pay, rather than in some other way. When a public employer has otherwise manifested an intent to treat a class of employees as bona fide executive, professional, or administrative personnel, it ordinarily would be reasonable to conclude that the employer will enforce its disciplinary rules in a way that is consistent with that intent.

In this case, respondents could enforce each of their rules that authorizes a disciplinary deduction of less than one week's pay in a way that is consistent with the disciplinary deduction rule. For example, although the penalty

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[7] By contrast, the state and local laws and policies governing partial-day absences that do not result in a loss of the exemption are those that *require* deduction from pay based on principles of public accountability. See 29 C.F.R. 541.5d. The special provision in Section 541.5d therefore was required to prevent a loss of exempt status. When deductions of less than one week's pay are required by governing law or policy, it is clear that employees are "subject to" reduction in pay within the meaning of Section 541.118(a).

for violating several rules is a reprimand to five-days' suspension, thereby creating a theoretical possibility of an improper deduction of less than one week's pay, Pet. App. 148a-149a, respondents could impose a reprimand or a five-day suspension without violating the disciplinary deduction rule. Petitioners therefore err in relying on respondents' disciplinary manual to show that they are "subject to" improper deductions within the meaning of Section 541.118(a).

2. Petitioners have offered only one concrete example of a sergeant (Sergeant Guzy) who was actually disciplined with a loss of less than one week's pay. Pet. Br. 41. As the court of appeals correctly concluded, that deduction occurred under "unique circumstances." Pet. App. 10a. In that incident, which occurred two years after suit was filed, the police department charged a sergeant with a violation of the city residency requirement and recommended that he be dismissed. *Ibid.* Under an agreement with the city, the sergeant waived his right to a hearing and accepted, in lieu of dismissal, a two-day suspension without pay. *Ibid.* Thus, respondents sought to implement a penalty that is consistent with the salary basis rule (termination) and implemented an unpaid suspension of less than one week only as the result of a settlement with the employee. We agree with the court of appeals that the "unique circumstances" surrounding that deduction do not divest other employees of their salaried status; that deduction does not show that the entire class of sergeants was subject to improper deductions as a practical matter.

E. Petitioners now seek to rely on other evidence to support their contention that they were subject to improper deductions. See Pet. Br. 41-42. For example, they claim that there is evidence that additional sergeants were actually subjected to disciplinary deductions of less than one week's pay for violations of non-major safety rules. Petitioners, however, never brought that evidence to the attention of the court of appeals or to the attention of

this Court at the petition stage.[8] Instead, petitioners chose to present a question that assumed that there were no applications of respondents' personnel rules. See Pet. i (emphasis added) ("Do * * * salary basis regulations * * * which require the loss of exempt status when an employee is 'subject to' nonsafety disciplinary suspension of less than a pay period apply only in cases of actual suspension *or* does DOL's interpretation that a personnel rule subjecting employees to discipline *alone* result[s] in loss of exempt status control the application of the rule?"). Petitioners' contention that there were additional examples of disciplinary deductions is therefore not properly before the Court. The same is true of petitioners' reliance (Pet. Br. 41) on testimony purporting to show that particular witnesses understood that sergeants would be impermissibly docked pay for disciplinary violations. Having failed to raise that contention in the court of appeals or before this Court at the petition stage, that contention is not properly presented here.

III. THE WINDOW OF CORRECTION IS OPEN TO RESPONDENTS TO CORRECT THE SINGLE IMPROPER DISCIPLINARY DEDUCTION IN THIS CASE

Respondents may rectify the single disciplinary deduction of less than one week's pay in this case by satisfying

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[8] In their brief before the court of appeals, petitioners' argument that respondents' pay practices ran afoul of the disciplinary deduction rule focused on the deduction from the pay of Sergeant Guzy. Brief of Appellants/Cross-Appellees 44; Reply Br. of Appellants/Cross-Appellees 21. They also asserted in that brief that "sergeants have received disciplinary suspensions for non-safety related reasons." Reply Br. of Appellants/Cross-Appellees 21 (emphasis added). But they failed to cite any record evidence to support that assertion. In their certiorari petition, petitioners did not state that there were any other actual deductions, while respondents represented as "fact[] that two hundred and eighty-eight (288) of the two hundred and eighty-nine (289) [p]etitioners had never been subjected to any alleged improper deduction from their salaries during the fourteen (14) year period prior to trial that they were paid on a salary basis." Br. in Opp. 13. Petitioners did not file a reply brief to refute that factual assertion.

the terms of the "window of correction" regulation. Under that requlation, the effect of making an improper deduction "depend[s] upon the facts in the particular case." 29 C.F.R. 541.118(a)(6). When the deductions indicate that there was "no intention to pay the employees on a salary basis," the exemption is not applicable. *Ibid.* But "where a deduction not permitted by these interpretations is inadvertent, or is made for reasons other than lack of work, the exemption will not be considered to have been lost if the employer reimburses the employee for such deductions and promises to comply in the future," *Ibid.* The court of appeals interpreted that provision to "allow[] employers to treat otherwise eligible employees as salaried, regardless of the employer's *one-time* or unintentional failure to adhere to § 541.118(a)'s requirements." Pet. App. 9a (quoting *Martin* v. *Malcolm Pirnie, Inc.*, 949 F.2d 611, 616 (2d Cir. 1991), cert. denied, 506 U.S. 905 (1992) (emphasis added by court below)). At the same time, the court concluded that the window of correction "is not available if the employer has a settled policy of making improper deductions." *Id.* at 10a.

That interpretation is consistent with the Secretary's construction of the "window of correction" provision. The Department of Labor's Wage and Hour Division issued an opinion letter on December 24, 1991, stating:

> The effect of making impermissible disciplinary deductions from "salaried" employees is discussed in § 541.118[(a)](6). Where a one-time disciplinary deduction is made, the exemption will not be considered to have been lost in all workweeks if the employer reimburses the employee for such deduction and agrees to not take any such impermissible deduction in the future. Where disciplinary deductions not permitted by the Regulations occur on a regular and recurring basis (e.g., because of an employer's policy), we would question whether such employees, including all of those in the "class" or "category" of employees affected by such deductions, are actually paid on a salary basis and the exemption may be denied in all workweeks.

Salary Basis, Wage & Hour Manual (BNA) 99:5257 (emphases omitted).

As we have explained, the single partial-week disciplinary deduction in this case was a one-time, unique event. There was no evidence presented to the court of appeals that respondents had an established practice of making such deductions. The window of correction is therefore available to respondents in this case, provided that they "reimburse[] the employee for [the improper] deduction[] and promise[] to comply in the future." 29 C.F.R. 541.118 (a)(6).

As petitioners note (Pet. Br. 43), respondents have not yet fulfilled all the conditions for invoking the window of correction. Accordingly, once the case returns to the district court, respondents must reimburse the one sergeant whose salary was improperly reduced and promise to comply with the Secretary's salary basis regulations in the future. The district court should not dismiss the case until respondents satisfy those conditions. That is apparently the course contemplated by the court of appeals. Pet. App. 10a.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

FRANCIS BERNARD AUER, *et al.*,

Petitioners,

v.

DAVID A. ROBBINS, *et al.*,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF POLICE ORGANIZATIONS, INC. IN SUPPORT OF PETITIONERS

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19pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

STATEMENT OF INTEREST OF THE NATIONAL ASSOCIATION OF POLICE ORGANIZATIONS 1

SUMMARY OF ARGUMENT 3

ARGUMENT:

I. Law Enforcement Officers Who are "Subject to" Non-Safety Disciplinary Suspensions for Periods of Less Than a Full Work Period are Non-Exempt Hourly Employees 5

II. The Nature of Modern Police Work Makes Imperative That Law Enforcement Officers Not Be Subjected to Excessive Tours of Duty in Any Given Period of Time 8

III. The Welfare and Safety of the Public Depends Upon Police Officers Not Being Compelled to Work Excessive Hours 12

CONCLUSION 14

TABLE OF AUTHORITIES

Cases **Pages(s)**

Abshire v. County of Kern, 908 F.2d 483 (9th Cir. 1990), cert. denied, 498 U.S. 1068 (1991). 6, 7

Balgowan v. New Jersey Department of Transportation, 1996 U.S.App. LEXIS 12544, 3 WH Cases2d 524 (2d Cir. May 31, 1996) 7

Carpenter v. City of Denver, -- F.3d --; [3 WH Cases2d 362] (10th Cir. 1996). 7

Hibert v. District of Columbia, 23 F.3d 429 (D.C. Cir. 1993). 7

Martin v. Malcom Pirnie, Inc., 949 F.2d 611 (2d Cir. 1991), cert. denied, 1135 S.Ct. 298 (1992). 7

Michigan Association of Government Employees v. Department of Corrections, 992 F.2d 82 (6th Cir. 1993). 7

Mueller v. Reich, 54 F.3d 438 (7th Cir. 1995), cert. pending, Case No. 95-586. 7

Powell v. United States Cartridge Co., 339 U.S. 497 (1950). 6

Shockley v. Newport News, 997 F.2d 18 (4th Cir. 1993). 7

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Statutes **Page(s)**

29 C.F.R. §§541 et. seq. (1996). 6, 7

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29 U.S.C. §213(a)(1). 6

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P. Reardon & M. O'Connor, *Police Tactical Teams Tempt the Fates Daily*, Chicago Tribune, Jan. 9, 1991, at 1-2 12

Department of Labor Brief, Martin v. Malcom Pirnie, 949 F.2d 611 (2d Cir.) (No. 6138), cert. denied, 1135 S.Ct. 298 (1992) 8

STATEMENT OF INTEREST OF THE NATIONAL ASSOCIATION OF POLICE ORGANIZATIONS

Amicus Curiae the National Association of Police Organizations, Inc. (hereinafter "NAPO") submits this brief in support of Petitioner Auer's arguments for reversal of the judgement in this case of the United States Court of Appeals for the Eighth Circuit which found that the Petitioners were not entitled under the federal Fair Labor Standards Act of 1938, as amended, 29 U.S.C. §§ 201 *et seq.*, to overtime compensation for certain hours worked.

NAPO is a nationwide association of labor and trade organizations representing state, local and federal law enforcement officers. Among other entities, NAPO represents the St. Louis Police Fraternal Organization, and, at the time of the filing of this case, the St. Louis Police Officers Association, the recognized police labor bargaining agents for St. Louis Police Sergeants and Officers, respectively. NAPO represents law enforcement officers throughout the state of Missouri, the territory of the Eighth Circuit, and the United States. Through its state and local affiliates, NAPO actively represents approximately 190,000 sworn law enforcement officers throughout the country. In 1994, NAPO founded the National Law Enforcement Officers' Rights Center, which advocates the necessity of assuring fundamental due process and workplace rights for law enforcement officers in the face of increasing political pressures for the cost-cutting, as well as the investigation and prosecution, both civil and criminal, of police departments and officers.

NAPO has an important interest in this matter, as the

case presents issues the resolution of which will define the extent to which law enforcement officers throughout the United States will be entitled to receive the protections of the wage and hour provisions of the Fair Labor Standards Act. A clear enunciation of the scope and type of compensation which must be provided as a practical matter to officers in this situation is of tremendous importance to the constituent members of NAPO.

NAPO has received the written consent of Petitioners Francis Bernard Auer, *et al.*, and of Respondents David A. Robbins, *et al.*, to the filing of this brief as required by Rule 37.3 (a) of the Rules of this Court. The original copies of all consents have been filed with the Clerk of the Court as required by that Rule.

SUMMARY OF ARGUMENT

The men and women who serve our society as law enforcement officers are today exposed to extremes of violence, human misery, depravity, poverty and suffering of innocents which is unimaginable to most persons and which were for the most part foreign to police work as it was even 30 years ago. With the possible exception of combat veterans, today's police officer sees, and feels, and hears and smells more carnage and trauma than any other professional.

The Fair Labor Standards Act of 1938 (hereinafter "the FLSA") seeks to prevent the working of excessive tours of duty by police by providing an economic disincentive for police employers who might otherwise be tempted to work officers to the point of exhaustion. This economic disincentive is contained in the overtime provisions of the FLSA. 29 U.S.C. §207. These FLSA provisions were designed to discourage excessive working hours while at the same time promoting fuller employment (it being less expensive to hire a new employee at regular pay than to utilize an existing one at "time-and-a-half").

Because the public relies so crucially upon law enforcement officers in our democratic republic, the public's welfare and safety is directly and indivisibly linked to the well-being of our police. If officers and sergeant are worked to the point of exhaustion, it is not only the officers or their partners who will suffer. Common sense argues that drowsy or fatigued officers will be more likely to commit errors and mistakes than well-rested colleagues. In a profession which calls for alertness, the ability to observe, critical reasoning and

judgement regarding the application of force even to the point of discharging a firearm, decreased awareness is a recipe for public disaster. Other professions upon which the public heavily relies for its safety are thoroughly regulated by the federal government with regard to the number of hours an employee may work in any given period of time. Because the public would be placed at least as greatly at risk by over-worked police officers as they would be by fatigued pilots, train engineers or truckers, the FLSA's protections should extend to police officers for the benefit of both officer and public alike.

ARGUMENT

I. LAW ENFORCEMENT OFFICERS "SUBJECT TO" NON-SAFETY DISCIPLINARY SUSPENSIONS FOR PERIODS OF LESS THAN A FULL WORK PERIOD ARE NON-EXEMPT HOURLY EMPLOYEES.

The scope of the Fair Labor Standards Act was meant to be extremely broad. Congress realized that in order to prevent circumvention of the rule most employees needed to fall under its coverage. "Breadth of coverage" is vital to [the Act's] mission." Powell v. United States Cartridge Co., 339 U.S. 497, 516 (1950). This is precisely why exemptions are to be read in the most narrow sense. When claiming an exemption to the Act "the employer has the burden of proof,. . . they must show that the employees fit plainly and unmistakably within [the exemption's] terms." Abshire v. County of Kern, 908 F.2d 483, 485-86 (9th Cir. 1990), cert. denied, 498 U.S. 1068 (1991).

The major exemptions to the FLSA exist for bona fide executive, administrative, or professional employees. 29 U.S.C. §213(a)(1). The Secretary of Labor has broad power to define and limit these terms. Id. The Secretary has defined these exemptions in two ways. First, the duties of bona fide executive, professional and administrative employees are set forth in the Secretary's regulations executing the Act. See 29 C.F.R. §§541.1, .2, .3. Secondly, a bona fide professional, executive, or administrative employee must be paid a minimum weekly salary and must be paid it on a salary basis. See 29 C.F.R. §§541.1 (f), 541.2(e), 541.3(e).

An employee fails the salary basis test if pay penalties of less than a full pay period's salary are imposed upon the employee for reasons other than a major safety violation. 29 C.F.R. §541.118 (a)(5). The regulations state that these safety rules include "only those relating to the prevention of serious danger to the plant, or other employees." Id. The deductions in the case at bar did not fall within these exemptions.

The Department of Labor (DOL) prior to this case has also ruled that, even if no deduction has yet been made, as long as the employee is subject to a non-safety related disciplinary pay docking for periods of less than a full work period they are to be considered hourly employees who may not be exempted from FLSA coverage. The Second, Third, Fourth, Sixth, Seventh, Ninth, Tenth and D.C. Circuits have followed this practice and recognized the rule that an employer's policies making an employee's compensation "subject to" deduction and not actual deductions is determinative, and thus cause for denying an exemption. See Yourman v. Dinkins, 3 WH Cases2d 524 (2d Cir. 1996); Martin v. Malcom Pirnie, Inc., 949 F.2d 611 (2d Cir. 1991), cert. denied, 1135 S.Ct. 298 (1992); Balgowan v. New Jersey Dept. of Transportation, 1996 U.S.App. LEXIS 11353, 3 WH Cases2d 488 (3d Cir. 1996), petition for rehearing pending, (1996); Shockley v. New port News, 997 F.2d 18 (4th Cir. 1993); Michigan Association of Government Employees v. Department of Corrections, 992 F.2d 82 (6th Cir. 1993); Mueller v. Reich, 54 F.3d 438 (7th Cir. 1995), cert. pending, Case No. 95-586; Abshire v. County of Kern, 908 F.2d 483 (9th Cir. 1990), cert. denied, 111 S.Ct. 785 (1991); Carpenter v. City of Denver, --- F.3d ---; [3 WH Cases2d 362] (10th Cir. 1996); Hibert v. District of Columbia, 23 F.3d 429 (D.C. Cir. 1993). In Martin, for example, the DOL

explained that its regulations provide that simply being "subject to" a docking is sufficient to prove hourly, rather than salaried status. Martin 949 F.2d 611 (2d Cir. 1991) cert. denied, 1135 S.Ct 298 (1992). The DOL particularly supported the Abshire court's adoption of a narrow reading of the exceptions to the salary basis rule:

> "The Abshire court reject[ed] defendant's argument that employees are salaried because no deductions were actually made . . . As the district court explicitly stated, 'it is the potential for reduction that destroys exempt status.'" Department of Labor Brief, Martin v. Malcom Pirnie, 949 F.2d 611 (2d Cir.), (No. 6138), cert. denied, 1135 S.Ct. 298 (1992) at 19-20 (emphasis in original) (see also p. 23 where DOL argues "subject to" cases are consistent with regulations).

As a result, if the Court follows the prior guidance of the DOL, being subject to a pay docking of less than one week will disqualify an employee from exempt status.

Any officer "subject to" pay docking should be considered an hourly employee. If the Court were to follow the opposing view that the docking must take place to revoke the exemption the result would be irrational. In effect the Court would be saying that in order to be eligible for hourly status, the employee would have to be first docked in (hourly) pay. This is not the type of incentive the Act was written to promote. The Court need only look to the DOL's previous regulations to see that an employee's being "subject to" pay

docking of less than a full pay period is contrary to the definitional status of an employee with an executive, administrative or professional exemption.

II. THE NATURE OF MODERN POLICE WORK MAKES IMPERATIVE THAT LAW ENFORCEMENT OFFICERS NOT BE SUBJECTED TO EXCESSIVE TOURS OF DUTY IN ANY GIVEN PERIOD OF TIME.

"An American law enforcement officer encounters more human tragedy in the first three years of his career than most of us see in a lifetime." E. Scrivner, *Psychological Reactions to the Use of Deadly Force*, Nat'l Sheriff Mag., Feb./Mar. 1985.

Police work embraces that which is most noble about the human condition. It extols service to others; it values protection for the weak; it commits itself to justice and it rewards bravery and sacrifice. At the same time, however, that we demand that our police officers follow these lofty ideals, they often serve in the very abyss of human cruelty and depravity. No one knows better than a police officer the evil that men can do. The extent of man's capacity to do wrong is such that even a veteran of police work can be shocked by what he or she sometimes sees. And hears. And touches. Yet however strong the feeling of repulsion, however great the urge to flee or to ignore, the officer has sworn an oath to do his or her duty.

It is the officer who must try to revive the obviously dead infant. It is the officer who must deliver the terrible news

that a spouse has been killed. It is the officer who crawls into the canal to pull out the grotesquely disfigured body. It is the officer who holds and tries in vain to comfort the violated child. It is the officer who is so often despised by others simply because of the job he or she does. It is the officer who sacrifices so much of family life and relationships for "the Job". It is the officer who is so frequently the target of violence even unto death.

Because law enforcement officers face such daily tragedy, they are subjected to tremendous amounts of stress. In fact, many studies consider police work one of the most, if not the most, stressful occupation in the United States. Alkus and Padesky, *Special Problems of Police Officers: Stress Related Issues and Interventions*, 11(2) Counselling Psychologist 55-62 (1983). The causes of the stress extend far beyond the inherent danger of apprehending criminals. Excessive hours, unreasonable amounts of paperwork, organizational practices such as poor supervision and direction, and judgments offered by a hostile public are often cited by police officers as the causes of their stress. Graf, *The Relationship Between Social Support and Occupational Stress Among Police Officers*, 14(3) J. Police Science and Administration 178-186 (1986).

In many instances, even when an officer is working less than the FLSA's maximum allowable "straight time", the amount of stress reaches unhealthy proportions. It is generally accepted by the medical community that increased stress is associated with poorer physical and mental health. Numerous studies link the frustration caused by prolonged stress with increased heart rate and systolic blood pressure as well as

actual tissue damage. Cobb & Rose, *Hypertension, Peptic Ulcer, and Diabetes in Air Traffic Controllers*, 224(4) J. Amer. Med. Assoc. 489 (1973). "Such stress-related health problems, as judged by morbidity and mortality figures, occur more with police officers as a group than most other occupations. Alkus at 55. Even more disturbing is the fact that the suicide rate for police was approximately twice that for lawyers and judges (two high risk groups) and that the death rate from cardiovascular disease was also significantly higher. Singleton & Teahan, *Effects of Job-Related Stress on the Physical and Psychological Adjustment of Police Officers*, 6 J. Police Science and Administration 355 (1978).

It appears that sergeants are particularly susceptible to the effects of stress. They often work long hours and are saddled with a heavy workload. Cooper, Davidson, and Robinson, *Stress in the Police Service*, 24 J. Occup. Med. 30-36 (1982). Many departments, in an attempt to avoid paying overtime to patrol officers (hourly workers), force sergeants (salaried employees) to shoulder the excess work. In many instances the excess is significant. Such practices not only hurt the force, but also circumvent the purpose of the FLSA which is a equitably shorter uniform hour standard for law enforcement.

The toll of stress unfortunately is not limited to physical ailments. The tribulations of police work also exact a psychological toll on the officer. Extended exposure to stress causes the officer difficulties both on the job and at home. Over time, a officer working in such a constantly stressful situation may begin to distrust and even dislike the people he or she is sworn to serve and protect, and even wishing they

would "get out of my life". Maslach and Jackson, *Burned-Out Cops and Their Families*, Psychology Today, 59 (1979). This response is a protective device: it reduces emotional attachment and thus stress, but also has the consequence of seriously impairing the officer's quality of human contact both on and off the job. Id. This is a serious problem in a field that deals with the public by definition. The result of burnout on a given department can range from low morale and performance to absenteeism and high job turnover. In any event, it is clear that the result is not a positive one.

An officer greatly affected by stress transfers his or her distant nature to his or her homelife. "In the high-burnout cop's family (assuming a male officer), the children are four times as likely to look exclusively to their mother for support. The man is twice as likely to report feeling distant from the children. The alienation between the officer and the children is often mirrored between the officer and the spouse." Id. A major problem is that the officer won't tell his or her spouse about the daily stress of the job, either to protect the spouse, or just as likely to avoid reliving the stress himself. As one officer stated, "The stress of the job is so bad sometimes, [one officer] said, that he stays an extra hour at work, just to cool down, before going home. 'A lot of times, I don't tell my wife everything, the most dangerous parts,' he said." P. Reardon & M. O'Connor, *Police Tactical Teams Tempt the Fates Daily*, Chicago Tribune, Jan. 9, 1991, at 1-2.

It is obvious not only to medical experts but even to the casual observer that long hours of stressful duty have a negative effect. Congress has also recognized the need for limited work hours for police. As the developmental history of

the FLSA has demonstrated, one of the primary factors in reducing law enforcement work hours to their present level was the concern that working longer hours than those prescribed would have a detrimental effect on the officer, both on the job and at home. It seems clear, then, that the number of maximum allowable "straight-time" hours set forth in the public safety worker provisions of the FLSA was selected for the specific protection of police workers and should thus be strictly observed.

III. THE WELFARE AND SAFETY OF THE PUBLIC DEPENDS UPON POLICE OFFICERS NOT BEING COMPELLED TO WORK EXCESSIVE HOURS.

The stress associated with an officer's job also affects his or her interactions with the public. Excessive stress is has been shown to bring about low work motivation which is associated with poor quality and quantity of work. Aldag, *Supervisory Style and Police Stress*, 6 J. Police Science and Administration 362-67 (1978). Excessive hours and the stress associated with them produce in officers attitudes of defensiveness, suspiciousness, and the feeling that outsiders do not understand police problems. Singleton at 359. Such attitudes have been shown to create classic "fight or flight" responses in officers. Alkus at 58. Fight or flight is characterized by officers who, when confronted with a situation requiring active intervention, react with either overzealous or avoidance behavior. In either case the response is not conducive to appropriate police work.

Out of the two responses, overzealousness is more

prevalent. It is also a more dangerous response both for the officer and the public. Overzealousness due to prolonged stress is often typified by risk-taking behavior by the officer, such as entering a home without assessing the danger or forgetting to call for backup. Alkus at 59. It has been hypothesized that possession of the above attitudes increase the probability that an officer will be involved in an injurious physical attack with possible lethal or near lethal consequences to self, partner, or suspect. Singleton at 359. In fact, many instances of excessive force used against suspects are manifestations of prolonged stress and overwork. Alkus at 59.

The second response to prolonged stress is avoidance. Simply put, this behavior is exhibited where officers take actions to reduce or completely avoid stress. Avoidance is illustrated through the deferring of decisions, ignoring the wishes of subordinates and peers in strict deference to those of superiors, becoming overly formal in relations with others, resorting to deceptive practices, or by the adoption of any number of avoidance mechanisms. Aldag at 367. The result is an officer who, instead of attempting to improve his or her performance and that of those surrounding him or her, is seeking to just go through the motions to the detriment of the public.

As has been clearly displayed the effects of stress associated with long hours of police work are not limited only to the officer but impact the public as well. An officer suffering from stress induced overzealousness subjects the public to a greater risk of injury due to either the officer's increased risk taking or use of excessive force. On the other hand, the public also suffers at the hands of officers plagued

with an avoidance disorder. This type of officer will refrain from acting on the public behalf unless action is totally unavoidable. In order for police to continue to serve the public interest to the fullest degree stress must be reduced through strict adherence to the FLSA's economic restrictions on maximum allowable hours for police employees.

CONCLUSION

For the foregoing reasons, *amicus curiae* the National Association of Police Organizations, Inc. respectfully requests that the Court reverse the judgement in this case of the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted this 22nd day of August, 1996,

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IN THE
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OCTOBER TERM, 1996

FRANCIS BERNARD AUER, *et al.*,
Petitioners,
v.
DAVID A. ROBBINS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF THE AMICUS CURIAE	1
SUMMARY OF THE ARGUMENT	2
ARGUMENT	3
I. THE SALARY BASIS TEST REGULATES THE SCOPE OF THE NATIONAL HOURS STANDARD, THE MAINTENANCE OF WHICH IS A CENTRAL AND INDEPENDENT OBJECTIVE OF THE FLSA	4
II. THE SALARY BASIS TEST IS A REASONABLE TEST FOR EXCLUSION FROM THE PROTECTION OF THE FLSA'S MAXIMUM HOUR STANDARD	8
III. THE EMPLOYER DID NOT CARRY ITS BURDEN OF PROVING PLAINTIFFS WERE PAID ON A SALARY BASIS	17
A. The Employer's Express Policy Rendered Plaintiffs "Subject to" Disciplinary Suspension	18
B. The Plaintiffs Were "Subject to" Disciplinary Suspension "as a Practical Matter"	22
IV. THE EMPLOYER CANNOT GO THROUGH THE WINDOW OF CORRECTION	25
CONCLUSION	27

TABLE OF AUTHORITIES

CASES — Page

Abshire v. County of Kern, 908 F.2d 483 (9th Cir. 1990), *cert. denied*, 498 U.S. 1068 (1991) 14, 19, 24, 25, 26
Atlanta Professional Firefighters Union v. Atlanta, 920 F.2d 800 (11th Cir. 1991) 21
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Page

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29 U.S.C. § 216 ..... 17, 26
Pub.L. 99-150, 99 Stat. 787 (Nov. 11, 1985) 16
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29 C.F.R. § 541 ..... *passim*
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5 Fed.Reg. 4077 (1940) 3
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19 Fed.Reg. 4405 (1954) 3
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50 Fed.Reg. 47696 (Nov. 19, 1985) 9
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Page

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IN THE

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On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

INTEREST OF THE AMICUS CURIAE

The American Federation of Labor and Congress of Industrial Organization (hereinafter AFL-CIO), a federation composed of 75 national and international unions representing over 13 million workers, files this brief *amicus curiae* with the consent of the parties as provided for in this Court's rules.

The AFL-CIO has a vital interest in the construction of one of the fundamental labor laws of our country, the Fair Labor Standards Act (hereinafter the FLSA), 29 U.S.C. § 201 *et seq.* The decisions below substantially

expand the categories of workers who are excluded from the protections of the Act in both the public and private sectors. The decisions also substantially increase the difficulty of enforcing the Act. The decisions therefore threaten the viability of the national maximum hour standard Congress created in the FLSA. It is for these reasons that the AFL-CIO seeks to state its views on the question before the Court.

SUMMARY OF THE ARGUMENT

For over 50 years, the salary basis test has been integral to determining whether employees are employed in a "bona fide executive, administrative, or professional capacity" and are thus exempt from the protection of the FLSA. In practice, the salary basis test regulates the scope of the Act's hours standard. The salary basis test is a reasonable test for exclusion from the maximum hours provisions because being paid on a salary basis is a readily identifiable proxy for performing the duties of an exempt employee, because employees who are paid on a salary basis control their own time and are thus not subject to the harms Congress aimed to remedy by discouraging long hours, and because being paid on a salary basis constitutes an adequate trade-off for the absence of statutory protection.

The Court of Appeals erred when it held that the employer in this case carried its burden of proving that the plaintiff-employees were paid on a salary basis because the employer maintained a written policy that rendered the employees "subject to" disciplinary suspension without pay for less than one week for reasons other than violation of safety rules of major significance and because plaintiff employees were "subject to" such suspensions as a practical matter.

The Court of Appeals also erred when it held that the employer could pass through the "window of correction" and thus maintain the exemption for an employee who had

actually been suspended because the employer did not reimburse the employee, did not promise to comply in the future, did not take either of these actions prior to the initiation of litigation, and did not act inadvertently.

ARGUMENT

In this case, the courts below substantially—and, we submit, erroneously—broadened the scope of the principal limitation on the protective sweep of the FLSA. The FLSA does not protect "any employee employed in a bona fide executive, administrative, or professional capacity . . . (as such terms are defined and delimited from time to time by regulations of the Secretary)." 29 U.S.C. § 213(a)(1). Since 1940, two years after the FLSA became law, the Department of Labor (hereinafter "DOL") has "defined and delimited" these statutory terms through two tests: a "salary test" and a "duties test." *See* 5 Fed. Reg. 4077 (1940) (sections 541.1(e), .2(a), .3(b)); 29 C.F.R. § 541.1(f), .2(e)(1), .3(e).[1]

To be exempt under these tests, an employee must (1) be paid a minimum salary[2] and (2) perform the duties of a bona fide executive, administrative, or professional employee. In turn, the "salary test" itself has two elements. To be exempt, employees must (1) receive a minimum amount of compensation each week and (2) receive this compensation on a "salary basis" rather than an hourly basis. *See, e.g.*, 29 C.F.R. § 541.1(f). It is the salary

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[1] In 1949, the DOL amended the regulation to specify, in a manner similar to the present 29 C.F.R. § 541.118(a), precisely what it means to be paid on a "salary basis." *See* 14 Fed. Reg. 7730, 7735 (1949). Finally, in 1954, the DOL adopted the test in the form at issue here. *See* 19 Fed.Reg. 4405 (1954).

[2] The only exceptions to this requirement are employees who hold a license or certificate to practice law or medicine and who are actually engaged in the practice of those professions, medical interns and residents, and teachers who need not be paid a minimum salary in order to qualify as exempt professionals. *See* 29 C.F.R. § 541.3(e).

basis element of the salary test that is at issue in this case.[3]

I. THE SALARY BASIS TEST REGULATES THE SCOPE OF THE NATIONAL HOURS STANDARD, THE MAINTENANCE OF WHICH IS A CENTRAL AND INDEPENDENT OBJECTIVE OF THE FLSA.

We begin our analysis by outlining the role of the salary basis test in effectuating the FLSA's statutory scheme.

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[3] The relevant parts of the regulation at issue provide:

> An employee will be considered to be paid "on a salary basis" within the meaning of the regulations if under his employment agreement he regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed. Subject to the exceptions provided below, the employee must receive his full salary for any week in which he performs any work without regard to the number of days or hours worked. This policy is also subject to the general rule that an employee need not be paid for any workweek in which he performs no work.
>
> (1) An employee will not be considered to be "on a salary basis" if deductions from his predetermined compensation are made for absences occasioned by the employer or by the operating requirements of the business. Accordingly, if the employee is ready, willing, and able to work, deductions may not be made for time when work is not available.
>
> (2) Deductions may be made, however, when the employee absents himself from work for a day or more for personal reasons, other than sickness or accident. Thus, if an employee is absent for a day or longer to handle personal affairs, his salaried status will not be affected if deductions are made from his salary for such absences.
>
> . . . .
>
> (5) Penalties imposed in good faith for infractions of safety rules of major significance will not affect the employee's salaried status. Safety rules of major significance include only those relating to the prevention of serious danger to the plant, or other employees, such as rules prohibiting smoking in explosive plants, oil refineries, and coal mines.

29 C.F.R. §541.118(a).

First, the salary basis test is, in practice, not relevant to the Act's minimum wage provision, but only to the coverage of the Act's maximum hour provision. This is because to pass the salary test, an employer must pay the employee in question a minimum amount that is intended to be well in excess of the minimum wage and pay the amount on a salary basis. In adopting the salary test, the DOL explained the basis of the minimum pay requirement: "the terminology of § 13(a)(1) implies a status which cannot be attained by those whose pay is close to or below the universal minimum envisaged in the act." DOL, "Executive, Administrative, Professional . . . Outside Salesman" Redefined—Report and Recommendations of the Presiding Officer at Hearings Preliminary to Redefinition 5 (Oct. 24, 1940) (hereinafter the "Stein Report"), JA 26.[4] Because a minimum weekly payment is a prerequisite to exemption, the requirement that the minimum be paid on a salary basis is ordinarily relevant only in overtime cases.

Second, the FLSA's hours standard is not intended to increase workers' compensation, but rather to create a financial incentive for employers to spread available work and reduce the dangers of overwork. Thus the suggestion made by many employers that the salary basis test is defective because it operates to bring workers who earn well in excess of the minimum wage within the protection of the FLSA is misplaced. Payment in excess of the minimum wage by itself does not suggest that a

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[4] When the salary test was first articulated, the minimum salary was $30 per week. Stein Report at 6. At that time, the minimum wage was 40 cents per hour. Stein Report at 19. An employee earning less than the minimum wage would have had to have worked over 75 hours in a week to pass the minimum payment element of the salary test and thus reach the salary basis element. A lack of administrative action has recently caused the minimum salaries to fall in relation to the minimum wage. The DOL attempted to correct this by increasing the minimum salaries to amounts in excess of 40 times the minimum wage, but the proposed regulation was deferred by presidential action. *See* 46 Fed.Reg. 3,013 (1981); 46 Fed.Reg. 11,972 (1981).

worker should be exempt from the FLSA's maximum hours provision. Congress intended to protect a wide range of workers—not only low wage workers—from the harms accompanying long hours. As the DOL explained when it first adopted the salary test in 1940: " 'A ceilng for hours' is just as much an independent objective of the Act as a 'floor for wages,' and surely it is a serious misreading of the Act to assume that Congress meant to discourage long hours of work only where the wages paid were close to the statutory minimum. Living conditions can be improved and work spread even where wages are comparatively high." Stein Report at 8, JA at 32. This Court has thus recognized the dual and independent objectives of the FLSA: "the FLSA was designed . . . to ensure that *each* employee covered by the Act would receive " '[a] fair day's pay for a fair day's work' *and* would be protected from 'the evil of 'overwork' *as well as* 'underpay.' " *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 739 (1981) (emphasis added).

Finally, workers at all earning levels continue to need the protection of the national hours standard. In fact, American workers have experienced a dramatic increase in the number of hours they work since the 1960s. The country's leading scholar of work time, Juliet B. Schor of Harvard University, and her colleague Laura Leete report that between 1969 and 1989, average annual hours of paid work by the fully employed increased by 138. *See* Laura Leete & Juliet B. Schor, Assessing the Time-Squeeze Hypothesis: Hours Worked in the United States, 1969-1989, 33 *Indus.Rel.L.J.* 25, 31 (1994). According to Louis Harris and Associates, the average American worked just over 50 hours per week in 1995 compared to just over 40 in 1973. *See* Humphrey Taylor, The Harris Poll 1995 #68, Table 2 (Nov. 6, 1995). A Joint Economic Committee staff study found that 80% of two-parent families with children worked more hours in 1989 than in 1979. *See* Labor Letter, *The Wall Street Journal*, Jan. 21, 1992, at A1. In April of 1994, average

manufacturing overtime hours were 4.8 per week, higher than they have been at any time since the BLS began collecting the statistics. *See* Juliet B. Schor, Worktime in Contemporary Context: Amending the Fair Labor Standards Act, 70 *Chi.Kent.L.Rev.* 157, 159 (1994) (citing Bureau of Labor Statistics, U.S. Dept. of Labor 41 *Employment and Earnings* 67 (1994)). According to Schor, 45% of American workers now work more than 45 hours a week. Juliet Schor, Decline of Leisure Time in America, 55 Vital Speeches of the Day 748, 749 (1994). And, while there is debate on other points, there is the broadest agreement that the increased work week is a pervasive reality for the well-educated, white-collar workers employers are most likely to misclassify as exempt executive, professional or administrative employees. *See* Mary Coleman & John Pencavel, Changes in Work Hours of Male Employees, 1940-1988, 46 *Ind. & Lab.Rel.Rev.* 262, 262 (1993); Coleman & Pencavel, Trends in Market Work Behavior of Women Since 1940, 46 *Ind. & Lab. Rel.Rev.* 653, 657 (1993).

The effects of the increase in work hours is exacerbated by the fact that household work has not declined to compensate for the increase of paid labor. While the average number of hours of household work done by women did decrease between 1969 and 1987, the decrease was more than offset by an increase in women's paid labor and men's household and paid work. Leete & Schor, Time-Squeeze at 33. The result is that total hours worked per year rose by 161 for women and 139 for men between 1969 and 1987. *Id.*

The increase in work hours has led to precisely the types of harms Congress aimed to eradicate through the creation of a national hours standard. A 1991 Gallup poll found that nearly two-thirds of working parents felt they spent too little time with their children. Larry Hugick & Jennifer Leonard, Gallup Poll, Mirror of America—Role of Work: Job Dissatisfaction Grows;

'Moonlighting' on the Rise, 56 Gallup Poll News Service (Sept. 2, 1991). More than one-third reported "a great deal" or "quite a lot" of conflict between the demands of work and family or personal relationships. *Id.* at 6. When asked which realm "suffers more" from such conflict, 77% responded that family and relationships suffer more. *Id.*

Increased work hours has thus caused a decline in the "general well-being of workers," particularly those on the border of the statutory exemptions. 29 U.S.C. § 202(a). The exemptions to the FLSA, and particularly the salary basis test for exemption, should be "narrowly construed" in order to further the objective embodied in the national hours standard. *Michael v. Kentucky Finance Co.*, 359 U.S 290, 295 (1959).

II. THE SALARY BASIS TEST IS A REASONABLE TEST FOR EXCLUSION FROM THE PROTECTION OF THE FLSA'S MAXIMUM HOUR STANDARD.

During the past 50 years, the DOL has taken extensive testimony and reviewed voluminous comments concerning the salary test and on five occasions has expressly affirmed the test's utility as a means of distinguishing between exempt and nonexempt employees.

The DOL has held three sets of hearings, in 1940, 1949, and 1958, to consider the definitions of the exemptions, and has solicited comments on the definitions, in 1954. *See* Stein Report; DOL, Report and Recommendations on Proposed Revisions of Regulations, Part 541 Defining the Terms "Executive" "Administrative" "Professional" "Local Retailing Capacity" "Outside Salesman" (June 1949) (hereinafter the "Weiss Report"); DOL, Report and Recommendations on Proposed Revisions of Regulations, Part 541 Defining the Terms "Executive" "Administrative" "Professional" "Local Retailing Capacity" "Outside Salesman" (March 1958) (hereinafter the "Kantor Report") (excerpts from these reports appear in the JA at 20-42); 19 C.F.R. § 1321 (1954). Extensive

testimony was taken at each set of hearings, including testimony concerning the salary test.[5] The reports of all three Presiding Officers discuss the salary test and affirm that test as an element of the definition of the exempt categories of employees.

Beginning in 1985, after the FLSA was extended to protect public employees, the DOL again solicited comments on the exemptions. *See* 50 Fed. Reg. 47696 (1985). In 1991, the Department published a notice of proposed rulemaking revising the application of the salary basis test in the public sector. *See* 56 Fed. Reg. 45828 (1991). The Department received 398 comments on the proposal. 57 Fed. Reg. 37670 (1992). After due consideration, the DOL reaffirmed the application of the salary test in the public sector, but relieved some public employers of the obligation to comply with one element of the test. Public employers that have "pay systems established by statute, ordinance, or regulation, or by a policy or practice established pursuant to principles of public accountability" which require that employees' accumulated leave be docked for absences of less than one day or that employees' pay be docked if they lack sufficient leave, are not, as a consequence, precluded from treating their employees as exempt. 29 U.S.C. § 541.5d.

At the same time, however, the DOL emphasized that "[a]ll other aspects of the salary test were left unchanged for the public sector." 57 Fed. Reg. 37671 (1992). The DOL explained, "Sufficient justification has not been shown in the comments to warrant eliminating altogether the 'salary basis' requirement or making it inapplicable to public sector employees paid above some minimum 'upset' salary level." 57 Fed. Reg. 37671 (1992). One element of the definition of payment on a salary basis that the DOL expressly left in effect in the public sector is the

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[5] In 1940, 165 witnesses testified; 295 in 1949; and an unreported number of "[r]epresentatives of industry and labor organizations and other interested persons" in 1958. *See* Stein Report at 2 n.4; Weiss Report at 97-100; Kantor Report at 2.

requirement that salaried employees not be subject to suspension for less than a week for reasons other then violations of safety rules of major significance. *See* 29 C.F.R. § 541.118(a)(5).[6]

In sum, on five occasions over the course of over 50 years, after the most thorough deliberation, the DOL has affirmed the application of the salary basis test, including the disciplinary suspension element of the test, to determine if employees in both the private and public sectors should be excluded from the protections of the FLSA.

Not surprisingly, then, the salary basis test is well suited to its statutory function of differentiating exempt from nonexempt workers. This is true for three distinct reasons.

1. The other basic test for "executive, administrative, or professional" employees—the duties test—is, in many instances, a complex one to apply to the myriad of factual situations presented by the real world of work. The DOL has found, however, that there is almost a one-to-one correspondence between the employees who are determined, after complex fact finding, to be performing executive, professional or administrative duties and employees who are paid on a salary basis. To put this another way, only in the rarest case is a duties test exempt employee paid on a non-salary basis. After the second set of hearings concerning the exemption regulations, the Presid-

[6] The DOL considered and rejected comments critical of this element of the salary basis test on the ground that

> the comments failed to demonstrate that public employers are significantly more restricted in the availability of options with respect to employee discipline than private employers. Although public employee terminations may require compliance with procedures designed to protect employee rights, termination for disciplinary reasons is not generally unavailable. In addition, other remedies for disciplinary infractions, such as official reprimands, demotions, and reassignments or restriction of duties, are generally available and used in the public sector.

57 Fed.Reg. 37674 (1992), PA 210a.

ing Officer explained, "The evidence at the hearing showed clearly that bona fide executive, administrative, and professional employees are almost universally paid on a salary or fee basis. . . . [A]n hourly rate . . . may therefore be rejected as inconsistent with true executive, administrative or professional status." Weiss Report at 24, JA at 36-37.

By the same token, the DOL has found that employees who perform the duties of administrative, professional and executive employees are rarely subject to disciplinary suspension. The Presiding Officer at the 1949 hearings considered "[t]he practice of disciplining bona fide executive, administrative, and professional employees by making deductions from their salaries," and found that "[s]uch deductions are rarely made today. The disciplining of such employees in the rare instances where it is needed is usually accomplished in other ways than by deductions from salary." Weiss Report at 25, JA at 39.

Since salary status is thus a proxy for performing executive, professional or administrative duties and since the salary test is simple and straightforward in application, it functions as a valuable screen to sort out nonexempt employees without requiring application of the duties test. The salary test makes it easier for employers to classify their employees and for employees to understand their rights. The salary test also makes enforcement of the Act less burdensome. After the 1949 hearings, the DOL's Presiding Officer clearly set forth the value of the salary test as a screening device:

> The experience of the Divisions since 1940 supports the soundness of the inclusion of the salary criteria in the regulations. The testimony at the hearing of many witnesses representing both employers and employees supported the experience of the Divisions with respect to the usefulness and propriety of a salary test for exemption. In this long experience, the salary tests . . . have amply proved their effectiveness in preventing the misclassification by employers of obviously nonexempt employees, thus tending to re-

> duce litigation. They have simplified enforcement by providing a ready method of screening out the obviously nonexempt employees, making an analysis of duties in such cases unnecessary. The salary requirements also have furnished a practical guide to the inspector as well as to employers and employees in borderline cases. In an overwhelming majority of cases, it has been found by careful inspection that personnel who did not meet the salary requirements would also not qualify under other sections of the regulations. . . . In the years of experience in administering the regulations, the Divisions have found no satisfactory substitute for the salary test.

Weiss Report at 8. The final of the DOL reports on the exemptions issued in 1958 similarly found:

> Essentially, the salary tests are guides to assist in distinguishing bona fide executive, administrative, and professional employees from those who were not intended by the Congress to come within these categories. They furnish a practical guide to the investigator as well as to employers and employees . . . and simplify enforcement by providing a ready method of screening out the obviously nonexempt employees. Employees who do not meet the salary test are generally also found not to meet the other requirements of the regulations.

Kantor Report at 3, JA at 42.

The salary test creates a bright line between exempt and nonexempt employees. Its outcome rests on a set of objective facts. The investigator need only ask whether an employee is paid more than the minimum and whether the employee's pay is subject to reduction for impermissible reasons. In contrast, the outcome of the duties test rests on a review of all the tasks actually performed by the employee and the percentage of time spent on each task. *See, e.g.*, 29 C.F.R. § 541.2 (defining duties of administrative employees). Predicting the outcome of the duties test and litigating under the duties test are both

significantly more difficult than application of the salary test. Thus the salary test is of substantial benefit to employers, employees, litigants, the DOL, and the courts. As the Presiding Officer concluded after the 1949 hearings, "Application of the regulations without a salary test would prove difficult for both management and labor and would increase enormously the difficulties of administration." Weiss Report at 9.

2. This correspondence between salaried status and exempt duties is not a mere happenstance. Rather, the definitions of the duties of all three categories of exempt employees include the consistent exercise of discretion. 29 C.F.R. § 541.1(d), .2(b), 3(b). Employees who exercise discretion in their work ordinarily also have discretion concerning when they do their work and the number of hours they need to perform the work. Exempt employees manage themselves and others, they are not the managed.

The independent logic of the salary test becomes apparent if one asks why professional, executive and administrative employees are excluded from the protections of the FLSA. Congress did not exclude these categories of employees simply because they tend to be relatively highly paid. This could easily have been done by basing exemption on pay rates. Nor did Congress exclude all nonmanual workers. This could also readily have been done directly.[7] Instead of excluding highly paid employees or all nonmanual workers, Congress exempted three distinct categories of employees. What do these three types of employees have in common? The answer is they generally control their own work time. They are compensated

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[7] In his 1940 Report, the DOL's Presiding Officer persuasively rejected the argument that Congress intended to exempt all "white collar workers." Stein Report at 6-7, JA 29. "Under the contrary opinion the specific statutory exemptions for named groups . . . would not be needed. . . . Surely if Congress had meant to exempt all white collar workers, it would have adopted far more general terms than those actually found in section 13(a)(1) of the Act." *Id.*

not for the number of hours they work but based on the "general value of the services performed." *Abshire v. County of Kern*, 908 F.2d 483, 486 (9th Cir. 1990), *cert. denied*, 498 U.S. 1068 (1991). As the District of Columbia Circuit observed, "payment on a salary basis is thought to identify executive, administrative, and professional personnel precisely because it indicates employees who are given discretion in managing their time and their activities." *Kinney v. District of Columbia*, 994 F.2d 6, 11 (D.C.Cir. 1993). See also *Balkowan v. Department of Transportation*, 84 F.3d 656, 662 (3rd Cir.), *reh'g granted, vacated on other grounds*, 3 W.HCases 2d (BNA) 672 (3rd Cir. 1996). As the DOL explained just four years after it adopted the salary test, "it is well recognized that bona fide executive, administrative, and professional employees are normally allowed some latitude with regard to the time spent at work." DOL, Wage and Hour Release No. A-9 (Aug. 24, 1944), reprinted in *Wage and Hour Manual (BNA)* 719 (Cum.Ed. 1944-45).

Being paid on a salary basis is thus more than simply a proxy for performing administrative, professional, or executive duties. It is the essence of why these three categories of employees are excluded from coverage. It makes sense to exclude employees who are paid on a salary basis from the overtime provisions of the Act because they control their own time and are, therefore, not subject to the harms Congress aimed to remedy by discouraging long hours.

The disciplinary suspensions at issue here clearly mark employees who do not control their own work time. If employees may be suspended without pay for one or two days, it is clear that they are compensated for the number of hours they work and not for the "general value of the service performed." As the Seventh Circuit recognized, "If an employer measures out discipline in the form of fractions of a weekly salary, the implication is that the employee is really being paid on an hourly basis." *Mueller v. Reich*, 54 F.3d 438, 443 (7th Cir. 1995).

A comparison of young accountants and skilled steelworkers is illustrative. Accountants may work over 40 hours per week, but they choose when to come to work and can take a break during the afternoon to attend to personal business. Steelworkers may work no more hours in the week and may even be paid more than the young accountants, but because steelworkers do not control their own time (they cannot come and go as they choose), their long hours are more oppressive and were the target of the FLSA's overtime provisions. The salary basis element of the salary test is thus a sensible means of determining whether employees are excluded from the protection of the Act's overtime provision.

3. Finally, the salary test serves to determine whether employees are in a sufficiently strong position to be able to protect their interests in the absence of statutory protection. According to the Presiding Officer at the 1940 hearings, the terms used to define the exemptions "impl[y] a certain prestige, status and importance." Stein Report at 19. Because employees who qualify for exemptions are denied the protections of the Act, "[i]t must be assumed that they enjoy compensatory privileges and this assumption will clearly fail if they are not paid a [substantial] salary." *Id.* "[T]he salary test" he concluded, is "of major importance in retaining the benefits of the act for a group of employees . . . who frequently have enjoyed no compensatory advantages." *Id.*, at 42. One of those "compensatory advantages" or "privileges" is freedom from disciplinary suspensions for all reasons except violation of safety rules of major significance.

The salary basis test thus not only serves to distinguish between employees who perform the duties of administrative, professional or executive employees and those who do not, but also between those who need the protections of the overtime provisions and those who do not.

Since the DOL promulgated the salary test in 1940, Congress has extended the coverage of the Act numerous times, including into the public sector in 1966, 1974, and 1985. *See Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 533 (1985); Pub.L. 99-150, 99 Stat. 787 (Nov. 11, 1985).[8] When an agency has a "longstanding interpretation" of a statute and Congress extends or re-enacts the statute "without pertinent change," Congress' failure to revise or repeal the agency's interpretation is "persuasive evidence that the interpretation is the one intended by Congress." *NLRB v. Aerospace Co., Div. of Textron*, 416 U.S. 267, 275 (1974). Indeed, in this instance, Congress has twice revised the salary test in minor respects since the FLSA was extended to the public sector. *See* Pub.L.No. 101-583, § 2, 104 Stat. 2871 (Nov. 15, 1990) (amending test as applied to computer programmers); Pub.L.No. 103-3, § 102(c), 107 Stat. 6 (Feb. 5, 1993) (amending test as it relates to leave taken under the Family and Medical Leave Act). And,

> Where an agency's statutory construction has been "fully brought to the attention of the public and the Congress," and the latter has not sought to alter that interpretation although it has amended the statute in other respects, then presumably the legislative intent has been correctly discerned.

North Haven Bd. of Ed. v. Bell, 456 U.S. 512, 535 (1982).

[8] The "particular needs and circumstances" of public employers were "carefully weighed and fairly accommodated" in the 1985 amendments to the Act. House Rep. No. 331, 99th Cong., 1st Sess. 17 (1985). The amendments tailored the law to the public sector, but did not in any way alter the definitions of the exemptions in the public sector. *See* Public Law 99-150, 99 Stat. 787 (1985). Public employers, like the respondent, were accommodated by allowing them (1) to require that law enforcement personnel work up to 171 hours over a period of 28 days without being obligated to pay premium overtime compensation, *see* 29 U.S.C. § 207(k); 29 C.F.R. § 553.201; and (2) to substitute compensatory time off for cash overtime compensation of their employees, *see* 29 U.S.C. § 207(o).

The salary basis test thus rests on the strongest statutory footing.

III. THE EMPLOYER DID NOT CARRY ITS BURDEN OF PROVING PLAINTIFFS WERE PAID ON A SALARY BASIS.

On the undisputed facts, as a matter of law, the plaintiff-employees here were not paid on a salary basis—and that is true whether the governing DOL regulation is, in accord with the dominant view, read literally or whether it is read under the gloss suggested by the United States in its brief in opposition in this case.[9]

In evaluating whether the employer carried its burden of proof, this Court can be guided by its own clear jurisprudence affirming the weight of that burden. When Congress enacted the Fair Labor Standards Act in 1938, it intended to create "minimum standards of living necessary for health, efficiency, and general well-being of workers." 29 U.S.C. § 202(a). In a competitive economy, such minimum standards can only be effectively enforced if they are not subject to broad exceptions that create constant pressure on employers to evade the minimum standards. That is why this Court recognized that "breadth of coverage" is "vital to [the Act's] mission." *Powell v. United States Cartridge Co.*, 339 U.S. 497, 516 (1950). The Act's "scope was stated in terms of substantial universality." *Id.* "[W]ithin the tests of coverage fashioned by Congress, the Act has been construed lib-

[9] While not in dispute, some of the relevant facts must be found in the record, because the district court made no findings with regard to the disciplinary suspension issue. That court discussed the salary basis test only in its denial of plaintiff's motion for summary judgment. PA 71a-73a. But the trial court did not discuss the disciplinary suspension element of the test. Moreover, at the time the motion for summary judgment was denied, there were only 15 plaintiffs. Before trial, an additional 274 plaintiffs opted into the action pursuant to 29 U.S.C. § 216(b). After trial, the district court entered judgment in favor of the employer, but wholly failed to discuss the salary basis test in its opinion. PA 36a-68a.

erally to apply to the furthest reaches consistent with congressional direction." *Mitchell v. Lublin, McGaughy & Ass.*, 358 U.S. 207, 211 (1959). Correspondingly, this Court has repeatedly held that the statutory exemptions in the FLSA should be "narrowly construed." *Michael v. Kentucky Finance Co.*, 359 U.S. 290, 295 (1959). Employers bear a heavy burden of proving that employees fall "plainly and unmistakably within the [exemptions'] terms and spirit." *Corning Glass Works v. Brennan*, 417 U.S. 188, 196-97 (1974).

The employer failed to carry its burden of proving that it satisfied all elements of the salary basis test because the plaintiffs were "subject to" disciplinary suspensions not consistent with 29 C.F.R. § 541.118(a)(5).

A. The Employer's Express Policy Rendered Plaintiffs "Subject to" Disciplinary Suspension.

The employer's express policy clearly stated that plaintiff-employees were "subject to" suspension without pay for short periods for a variety of offenses not limited to violations of safety rules of major significance. PA 107a-113a, 143a-149a. And, the plain language of the governing DOL salary basis regulation makes clear that employees are *not* paid on a salary basis if their weekly salaries are "subject to reduction because of variations in the quality or quantity of the work performed." 29 C.F.R. § 118(a).

As the Seventh Circuit has recognized, " '[s]ubject to reduction' does not mean that a reduction was actually made. The plain meaning of the language suggests that it is enough that a reduction could have been made for an impermissible reason." *Klein v. Rush-Presbyterian-St. Luke's Medical Center*, 990 F.2d 279, 286 (7th Cir. 1993). This is the construction of a majority of the courts of appeals that have addressed the issue. *See Yourman v. Dinkins*, 84 F.3d 655 (2nd Cir. 1996); *Balgowan*, 84 F.3d at 662; *Carpenters v. Denver*, 82 F.3d 353, 359

(10th Cir. 1996); *Bankston v. Illinois*, 60 F.3d 1249, 1253 (7th Cir. 1995); *Hurley v. Oregon*, 27 F.3d 392, 395 n.7 (9th Cir. 1994); *Michigan Ass'n of Gov't Employees v. Department of Corrections*, 992 F.2d 82, 86 (6th Cir. 1993); *Klein*, 990 F.2d at 286; *Martin v. Malcolm Pirnie, Inc.*, 949 F.2d 611, 615, 617 (2nd Cir. 1991), *cert. denied*, 506 U.S. 905 (1992); *Abshire v. County of Kern*, 908 F.2d at 487.

In this instance, the literal reading of the regulation is also the most rational reading for three reasons. First, if, as in this case, the employer has made clear that employees are subject to short suspensions for misconduct other than violation of safety rules of major significance, then the employer has classified the employees in a manner that is inconsistent with the status of administrative, professional and executive employees. That is true whether or not deductions have actually been made. For such deductions will actually occur only if there is misconduct by the employee. Whether an employee or his or her coworker has engaged in misconduct surely is not relevant to the questions of whether they should be covered by the FLSA. The Third Circuit aptly observed that "it would be rather arbitrary to hold that whether an employer qualifies for . . . exemption shall be determined by the employees' collective good behavior." *Balgowan*, 84 F.3d at 663. As the Eleventh Circuit has added, "Such an interpretation of the regulations would lead to an irrational result, because it would favor employees who are disciplined for breaking the rules—and thus become eligible for overtime—over employees who respect those same rules." *Avery v. Talladega*, 24 F.3d 1337, 1342 (11th Cir. 1994). It is the act of classification that speaks to the status of the employees, not the use of the sanctions that the classification permits.[10]

[10] The D.C. Circuit recognized this point when it stated, "The regulation is intended, after all, to divide employees into classes based on their status, not to identify employees deserving compensation for individual losses." *Kinney*, 994 F.2d at 11.

Second, it is important to recognize that the "subject to" language prefaces the entire section defining what it means to be paid on a salary basis not just the disciplinary docking subsection. Employees must receive a predetermined amount that is not "subject to reduction because of variations in the . . . quantity of work performed." 29 C.F.R. § 541.118(a). While the DOL has created a limited exception to the salary basis test for public employers who dock employees pay for short absences because they are required to do so by principles of public accountability, 29 CF.R. § 541.5d, the entire salary basis test still applies in the private sector. Because the "subject to" language appears in the statement of the rule in subsection (a), it cannot be construed to mean one thing with respect to deductions for short absences and another thing with respect to disciplinary suspensions.

Employees do not control their own time, and thus should be protected by the Act's overtime provisions, if they are subject to being docked for short absences whether or not they are ever actually docked. If employees are subject to being docked for short absences, they will not leave work to take a child to the doctor or to attend to other personal business.[11] They cannot come and go as they choose and thus are likely to find long hours more oppressive than employees who are not subject to being docked for short absences. Thus, employees who are subject to being docked, not merely those who are actually docked, need the protection of the FLSA's overtime provisions.

Finally, there is no coherent alternative to a rule that renders employees nonexempt if they are subject to reduc-

[11] The Sixth Circuit, recognized this in *Michigan Ass'n of Gov. Emp.*, "Employees subject to reduction in pay will, of course, attempt to avoid those reductions by juggling schedules and sacrificing non-work opportunities. Simply because a reduction in pay has never been applied does not mean that the employee has not been affected by the policy subjecting the employee to pay reductions." 992 F.2d at 86.

tions in their salary. Neither the statute nor the regulation gives this Court any guidance concerning what amount of actual reduction would render an employee "subject to reduction" and thus nonexempt. A host of questions would be raised by the rejection of the literal terms of the regulation: would an employee gain the protection of the FLSA only for those weeks in which he or she was actually docked: would other employees occupying the same classification also gain protection even if they were not actually docked? There is no coherent answer to these questions because it does not make sense to require actual docking as a prerequisite to extending the protection of the Act.

While several lower courts, including the lower courts in this case, have held that employers can avail themselves of the exemptions even if their employees' salaries are subject to docking, so long as there has been no actual docking, none of these courts has even proposed a standard that can be used to determine what degree of docking will deprive employers of the exemptions, for what time periods, and as to which employees. *See* PA at 9a-10a; *McDonnell v. Omaha*, 999 F.2d 293, 297 (8th Cir. 1993), *cert. denied*, 510 U.S. 1163 (1994); *Atlanta Professional Firefighters Union v. Atlanta*, 920 F.2d 800, 805 (11th Cir. 1991).

The express policy rendering plaintiffs "subject to" disciplinary suspension prevented the employer from carrying its burden of proving plaintiffs were paid on a salary basis.[12]

[12] The prevailing construction of the salary basis regulation supported here imposes little burden on employers. If employers rarely, if ever, resort to docking the pay of otherwise exempt employees, they can readily amend their personnel policies to square them with their practices. An array of disciplinary measures can be substituted for short suspensions. Employers that wish to avail themselves of the exemptions will neither be denied the means of disciplining employees nor prevented from engaging in progressive discipline as a result.

B. The Plaintiffs Were "Subject to" Disciplinary Suspension "as a Practical Matter."

The United States in its brief *amicus curiae* on the *certiorari* petition, proposes a novel construction of the salary basis regulation pursuant to which "salary status is lost . . . only when employees are 'subject to' such a disciplinary suspension *as a practical matter*." U.S. Br. at 10. The government explains, "the employer has the burden of proving that the employees are paid on a salary basis, *e.g.*, by showing that there have been only isolated instances in which disciplinary suspensions have occurred, or that suspensions have occurred only in unusual circumstances." *Id.* Because the employer in this case did not carry even this burden, this Court need not and should not choose between the literal constrution of the regulation and the government's proposed construction. Such a choice is not only unnecessary to decide this case, but premature before the DOL adopts the proposed construction through appropriate administrative procedures.[13]

The employer in this case failed to prove that plaintiffs were not subject to disciplinary suspension as a practical matter. There is no dispute that the employer had a written policy providing for such suspension. The employer presented no evidence that it has revised its policy to make clear that plaintiff-employees could not be suspended for less than a pay period for reasons other than safety violations of major significance. In fact, while the litigation was pending, the employer revised its policy to make termination the sole penalty for violation of its residency requirement, while leaving plaintiff-employees subject to suspension for less than a pay period for all other types of infractions. JA 87; PA 218a.[14] Equally to

[13] The DOL has recently published a notice of its intention to review the regulation at issue. *See* 61 Fed.Reg. 23238 (1996), JA 43.

[14] This revision was obviously motivated by the inconsistency of merely suspending an employee for an ongoing violation of the

the point, in the face of its clear policy and the limited reason of that policy, the employer presented no witness to testify that it would not in the future suspend plaintiff-employees for less than a pay period of reasons other than violation of safety rules of major significance.

The employer, with full access to the personnel files of all its employees, presented no witness to testify that it had not suspended any plaintiff for less than a pay period for reasons other than violation of safety rules of major significance. In fact, the employer's Chief of Police, who was designated by the employer pursuant to Fed. R. Civ. P. 30(b)(6) to testify about its personnel policies, testified that a sergeant "could be—he could be suspended . . ., say, maybe one day suspension, two day suspension." JA 60 (testimony of Chief of Police Robert Scheetz). *See also* JA 53. Several other management and supervisory witnesses testified that plaintiffs could be suspended for less than a pay period for reasons other than violation of safety rules of major significance. *See* JA 53 (testimony of Rosalie Corelyou, defendant's 30(b)(6) designee on compensation administration, that "they may say your punishment is two days plus the day you were not here"); 63 (testimony of Larry Pattison, defendant's 30(b)(6) designee on FLSA exemptions, that "the discipline could include suspension for a particular number of days, which would be loss of pay for that day"); 76 (testimony of Lt. James Scago that "[s]ure, but it could be longer than a day or two or it could be less"). Several plaintiffs testified that they could be suspended for less than a pay period for reasons other than violation of safety rules of major significance. *See, e.g.*, JA 85, 86; PA 217a.

One of the 16 plaintiffs who testified was suspended for less than a pay period for violation of the residency requirement. JA 87; PA 217a.[15] While the suspension re-

residency requirement rather than a desire to insure that employees were paid on a salary basis.

[15] Because the case was bifurcated and the liability phase involved the testimony of only 16 representative plaintiffs, jointly chosen

sulted from the reduction of an initial proposal to remove the plaintiff, this is not an unusual circumstance, but rather a common occurrence resulting from both formal grievance procedures and informal protests and compromises between employers and employees. In addition, another plaintiff testified that he knew of other sergeants who had been suspended. JA 86.

Even courts, such as the Eleventh Circuit, that have held that actual deductions are necessary to deprive an employer of the benefit of the exemptions, hold that the suspension of one employee prevents the employer from claiming the exemptions for all employees in the same classification. *See Avery*, 24 F.3d at 1342. The DOL has endorsed this conclusion.[16]

Finally, there is other evidence in the record suggesting that plaintiffs were not paid on a salary basis. Plaintiffs' time and attendance records were kept on an hourly basis and they were subject to strict reporting and attendance requirements. JA 60, 65.[17] Some plaintiffs earned additional cash compensation or compensatory time off for extra hours worked and some received a shift differential on an hourly basis. JA 48, 73, 76, 79, 81, 82, 15-17, 47, 51.[18]

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by the parties, their supervisors, and Fed.R.Civ.P. 30(b)(6) designees, the testimony of the 16 plaintiffs should be understood to be representative of the experience of all 289 plaintiffs.

[16] In 1992, the DOL was asked to "[c]larify that all improper deductions result in loss of the exemption only for the particular employee docked and only in the workweek of the improper deductions," 57 Fed. Reg. 37666 (1992), PA 211a. The DOL classified the "suggested change" as "a significant departure from long-standing policy that is not substantiated by comment." *Id.*

[17] Several lower courts have held that rigid, hourly attendance requirements are inconsistent with salaried status. *See, e.g., Abshire*, 908 F.2d at 486 (exempt employees "are thought not to punch a time clock").

[18] Several lower courts have held that additional compensation for extra hours worked is inconsistent with salaried status. *See*

Under any plausible construction of the salary basis test, the employer did not carry its burden of proof in this case.

IV. THE EMPLOYER CANNOT GO THROUGH THE WINDOW OF CORRECTION.

There is a narrow "window of correction" available to employers who have inadvertently and in isolated instances acted inconsistently with the salary basis test. 29 C.F.R. § 118(a)(6) provides that "where a deduction not permitted by these interpretations is inadvertent, or is made for reasons other than lack of work, the exemption will not be considered to have been lost if the employer reimburses the employee for such deductions and promises to comply in the future." [19]

It is obvious that the employer here cannot pass through the window of correction because it has not complied with the express terms of the regulation. The employer has not

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Abshire, 908 F.2d at 486; *Brock v. Claridge Hotel and Casino*, 846 F.2d 180, 184-85 (3d Cir. 1988). 29 C.F.R. § 541.118(b) provides that additional compensation over a minimum salary is not inconsistent with payment on a salary basis, but the examples given in the subsection are commissions on sales, a percentage of sales, and payment for extra days or shifts worked. The subsection thus implies that extra compensation for extra hours worked is inconsistent with payment on a salary basis.

[19] The entire subsection provides:

> The effect of making a deduction which is not permitted under these interpretations will depend upon the facts in the particular case. Where deductions are generally made when there is no work available, it indicates that there was no intention to pay the employee on a salary basis. In such a case the exemption would not be applicable to him during the entire period when such deductions were being made. On the other hand, where a deduction not permitted by these interpretations is inadvertent, or is made for reasons other than lack of work, the exemption will not be considered to have been lost if the employer reimburses the employee for such deductions and promises to comply in the future.

reimbursed even the one employee who was shown to have been docked. Moreover, the employer has not revised its discipline policy to exclude allegedly exempt classifications or in any other way promised not to dock such employees in the future.

Even if the employer were to now reimburse all employees who have been suspended and promise not to suspend allegedly exempt employees in the future, the window of correction should be deemed closed once litigation is initiated. A contrary rule would encourage employers to ignore the salary test, deny overtime compensation to hourly employees, wait to be sued, and then merely reimburse those employees who sue for any reductions they suffered. Such a result would deprive employees who have been treated as hourly employees of the remedies specifically provided for in the Act: recovery of "unpaid overtime compensation . . . and . . . an additional equal amount as liquidated damages." 29 U.S.C. § 216(b).

Finally, the window of correction should not be opened for employers who have made deliberate rather than inadvertent deductions. While the literal terms of the subsection appear to allow employers to utilize the window of correction where deductions are inadvertent *or* made for reasons other than lack of work, the majority of courts of appeal have held that the subsection should be read in the conjunctive rather than the disjunctive. *See Klein*, 990 F.2d at 287; *Martin*, 949 F.2d at 616-17; *Abshire*, 908 F.2d at 489.[20] To allow an employer to expressly and

[20] In this case, the Court of Appeals makes contradictory statements on this issue. On the one hand, the court below states that "[b]ecause the regulation is written in the disjunctive, it is not material that the deduction from Sergeant Guzy's pay was not inadvertent so long as it was made for reasons other than lack of work," PA 9a-10a n.7, but, on the other hand, that court states, that "[t]he 'window of correction' is not available if the employer has a settled policy of making improper deductions from compensation." PA 10a.

deliberately treat employees as hourly employees, to require that those employees work overtime, to deny those employees overtime compensation required by the FLSA and then allow the employer to avoid any obligation to pay overtime compensation if it merely reimburses the employees for any reductions in their salaries, would be to gut the effectiveness of the salary basis test. Such an outcome would undermine the statutory objective of discouraging long hours among hourly employees and deny employees who have been treated as hourly and not paid in accordance with the Act an adequate remedy.

Because the employer in this case has not reimbursed employees for reductions, has not promised to comply in the future, did not correct its practice prior to initiation of litigation, and made reductions pursuant to an express policy, the employer cannot pass through the window of correction.

CONCLUSION

For the above-stated reasons, this Court should reverse the decision below with directions to enter judgment in favor of the plaintiffs.

Respectfully submitted,

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

FRANCIS BERNARD AUER, *et al.*,

Petitioners,

v.

DAVID A. ROBBINS, *et al.*,

Respondents.

On Writ of *Certiorari* to the United States Court of Appeals for the Eighth Circuit

BRIEF OF NATIONAL EMPLOYMENT LAW PROJECT, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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ISSUES PRESENTED

The Fair Labor Standards Act's 29 U.S.C. §201 et seq., ("FLSA") hours of work standard protects the health and safety of and generates jobs for working people. This case presents an issue relating to the breadth of coverage of the FLSA, specifically --

> Should the FLSA salary basis "subject to" pay docking, 29 C.F.R. § 541.118(a), and "window of correction," 29 C.F.R. §541.118(a)(6), rules be construed narrowly to limit employer access to exemptions from the national hours of work standard codified in the Act;
>
> Or, should exemptions be allowed for an employer who purposely adopts rules or codes of conduct which expressly state that employees are "subject to" impermissible deductions, makes post-litigation promises to reimburse any impermissible deductions conditioned upon an order from a court and revokes only a portion of the offending rule or disciplinary code?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

THE AMICUS CURIAE NATIONAL EMPLOYMENT LAW PROJECT AND THEIR INTEREST 1

STATEMENT OF THE CASE 2

ARGUMENT:

I. PERMITTING EVER-EXPANDING EXEMPTIONS FLOUTS THE FLSA HOURS-OF-WORK STANDARD AND HURTS LOW-WAGE WORKERS AND OTHER GROWING SEGMENTS OF THE WORKFORCE. 3

A. FLSA Exemptions must be read narrowly. 5

B. Employer abuse of the FLSA exemptions disproportionately penalizes low-wage workers. 6

C. Mandatory overtime and an increasing workday are contrary to FLSA worker protection and job creation goals. 11

II. A NEW LOOK AT THE "BRANDEIS BRIEF" JUSTIFIES STRICT HOURS OF WORK RULES. 14

III. EXEMPTIONS CAN SWALLOW THE RULE. 18

IV. THE DECISION OF THE EIGHTH CIRCUIT SHOULD BE OVERTURNED. 20

A. The "Subject To" Rule: §541.118(a)(5). 20

B. The "Window of Correction": § 541.118(a)(6). 21

CONCLUSION. 22

APPENDIX A: Chronology of the FLSA and the Salary Basis Doctrine. 1a

TABLE OF AUTHORITIES

CASE CITES:

Arnold v. Ben Kanowsky, Inc.,
361 U.S. 388 (1960) 5

Auer v. Robbins,
65 F.3d 702 (8th Cir. 1995) 2, 3, 20, 21

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450 U.S. 728, 739 (1981) 4

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113 S. Ct. 298 (1992) 21

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(Case. No. 95-0586, January 10, 1996) 21

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THE *AMICUS CURIAE* NATIONAL EMPLOYMENT LAW PROJECT AND THEIR INTEREST

The *amicus* National Employment Law Project ("NELP") is a non-profit advocate for the employment rights of the working poor and the unemployed. The *amicus* has obtained consent from both parties to file this brief. It supports the Petitioners.

For over 25 years, NELP has worked with state and local advocates around the country, including legal services offices, community groups, and labor organizations to achieve strong workplace protections and access to government systems of support for low-wage workers and the unemployed. In addition, NELP has a long history of litigation and policy advocacy on a broad range of issues, including job training, employment discrimination, unemployment compensation, the employment rights of workfare participants, the Family and Medical Leave Act, and the FLSA.

In 1993, NELP formed the Employment Task Force, a nationwide network of advocates representing low wage workers and the unemployed.

NELP and its constituents have a direct and sustained interest in continued strict enforcement of a national hours-of-work standard and the narrow application of FLSA exemptions which is essential to coverage of low-wage workers who comprise a disproportionate and growing share of the workforce.

If exemptions are easy to obtain, a large middle segment of the work force will be exempted. Employers will give this exempted portion of the workforce extra

work, since they are essentially "free labor." And employers will be discouraged from both hiring more entry level employees to do the extra work and from paying lower paid employees at the time and one-half rate, thereby undermining the very purposes of the hours-of-work standard and harming the classes of persons who need protection the most, the low-wage employee and unemployed worker.

STATEMENT OF THE CASE

The Petitioners in this case are 289 police Sergeants and one Lieutenant of the St. Louis Police Department. The Department treats the Petitioners as FLSA exempt employees.

The Department's Police Manual expressly provides that all Petitioners are "subject to" disciplinary suspension of less than a full work period for infractions of over 40 non-safety related rules. See Pet. App. G, 102a. In fact, Sergeants in the Department are suspended for periods of less than one week for disciplinary reasons. J.A. 48-57, 60-62, 85-87.

The Petitioners brought this suit in the United States District Court for the Eastern District of Missouri on October 25, 1988. Pet. App. 68a-102a. On August 26, 1994, the District Court found that all of the Sergeant's positions except two were exempt. Pet. App. 67a-68a. On September 8, 1995, the Eighth Circuit, decided that even though all Petitioners in fact were "subject to" disciplinary deductions of less than a full pay period for any of the more than 40 violations of non-safety rules, "[t]he mere possibility of an improper deduction in pay does not defeat an employee's salaried status." Pet. App.

at 8a. The court acknowledged, however, that an employee is considered hourly and entitled to overtime compensation if the employee's pay is subject to deductions for a violation of any other non-safety rule. Pet. App. at 9a.

The Eighth Circuit also ruled that one employee had, in fact, been subjected to a post-litigation, intentional non-safety disciplinary deduction of less than a full pay period, which would require him to be treated as a nonsalaried employee. Pet. App. at 9a. However, the Court concluded that even though "[a]rguably, the department's two-day pay deduction from [the employee] would require him to be treated as a nonsalaried employee," the Department could avail itself of the "window of correction." Pet. App. at 9a. The Department corrected the improper deductions by issuing a subsequent, post-litigation amendment to the Police Manual, even though this revision only changed the one specific disciplinary rule which had been violated. Pet. App. at 10a.

ARGUMENT

I. PERMITTING EVER-EXPANDING EXEMPTIONS FLOUTS THE FLSA HOURS-OF-WORK STANDARD AND HURTS LOW-WAGE WORKERS AND OTHER GROWING SEGMENTS OF THE WORKFORCE.

The FLSA's hours-of-work standard establishes the forty hour work week. The FLSA was enacted with a dual purpose. The 1938 Act was explicit that the first congressional purpose was to protect workers from substandard wages and oppressive working hours, "labor conditions [that are] detrimental to the maintenance of the

minimum standard of living necessary for health, efficiency, and general well-being of workers." 29 U.S.C. §202(a).[1] The second purpose of the Act, the job creation goal, was highlighted by Justice Reed's 1941 opinion in Overnight Motor Transport v. Missel, 316 U.S. 572, 576 (1941).

> [The Court of Appeals] felt that one of the fundamental purposes of the Act was to induce work-sharing and relieve unemployment by reducing hours. We agree that the purpose of the Act was not limited to a scheme to raise substandard wages first by a minimum wage and then by increased pay for overtime work. Of course, this was one effect of the time and one half provision, but another and an intended effect was to require extra pay for overtime work by those covered by the act even though the hourly wages exceeded the statutory minimum. The provision of § 7(a) requiring this extra pay for overtime is clear and unambiguous. It calls for 150% of the regular, not the minimum wage. By this requirement although overtime was not flatly prohibited, financial pressure was applied to spread employment to avoid the extra wage and workers were assured additional pay to compensate them for the burden of a workweek beyond the hours of the act. In a period of widespread unemployment and small profits, the economy inherent in avoiding extra pay was expected to have an appreciable effect in the distribution of available work. Reduction of hours was part of the plan

1 See also, United States v. Darby, 312 U.S. 100, 109 (1941), Barrantine v. Arkansas Freight System, 450 U.S. 728, 739 (1981).

> from the beginning. . . . The message of November 15, 1937 calling for the enactment of this type of legislation referred again to protection from excessive hours. May 24, 1937, 81 Cong. Rec. 4983, 75th Cong. 1st Sess. Sen. Rep. No. 884 on S. 24754 (July 6, 1937), at 4. The Senate Report No, 884, the companions House Report, 82 House Rep. 1452, 75th Cong. 1st Sess., at 14 and 15 (1937), and the Conference Report, 83 Cong. Rec. 9246, 9254 (1937), all spoke of maximum hours as a separate desirable object. Indeed the Act itself in setting up two sections of standards, § 6 for wages and § 7 for hours, emphasizes the duality of the Congressional purpose. 316 U.S. at 577-578. (emphasis added).

A. FLSA Exemptions Must be Read Narrowly.

This Court has emphasized that the "breadth of coverage" of the FLSA's overtime work rules is "vital to [its] mission" of establishing a national work week standard and that statutory exemptions to the Act should be narrowly construed.[2] An employer claiming an exemption must establish entitlement to it by clear, convincing and affirmative evidence.[3] The presumption must be that all workers are covered.[4]

2 Powell v. United States Cartridge Co., 399 U.S. 497, 516 (1950); Mitchell v. Kentucky Finance Co., 359 U.S. 290, 295 (1959).

3 Corning Glass Works v. Brennan, 417 U.S. 188, 196-97 (1974).

4 Powell v. United States Cartridge Co., supra, 399 U.S. at 516; Arnold v. Ben Kanosky, Inc., 361 U.S. 388, 392 (1960).

The Eighth Circuit's ruling makes employer access to exemptions a virtual cakewalk; it could make evasion of the forty hour week commonplace.

B. Employer Abuse of the FLSA Exemptions Disproportionately Penalizes Low-Wage Workers.

In the 1940's business groups argued that all "white collar" workers should be exempt from the Act. The Department of Labor's Report and Recommendations of Presiding Officer Stein on October 10, 1940, discussed that idea --

> All of the foregoing arguments have as an inarticulate major premise the assumption that all salaried white collar workers enjoy satisfactory working conditions -- that they need no protection against oppressively long hours. The record shows the incorrectness of this assumption. There is evidence, some of it introduced by the proponents of the blanket exemption, that, prior to the effective date of the act, a workweek of 48 or 54 hours or even longer was common.

Today's employers remain driven toward treating all white collar workers as exempt in order to avoid paying employees overtime for working over forty hours in a week, and to avoid hiring more employees to do the extra work.

Recent real life examples of employer manipulation of the exemptions illustrate the point that low-wage workers are significantly impacted by this case.[5]

Example #1:
Maria is an assistant manager at a fast food restaurant. She works 72 hours a week for $300 salary. Her hourly rate is $4.16 an hour -- less than the minimum wage. Her employer classified her as a low-level supervisor and did not pay her overtime under the "executive employee" exemption.

Example #2:
Ralph, a convenience store clerk in Weslaco, Texas, was often the only employee on the premises in the evenings and on weekends. He fulfilled all duties in the store, from ringing up customers, stocking shelves, and closing up the store, often after midnight. As a "manager," he was classified by his employer as an "executive employee," and did not receive overtime payments.

Example #3:
Lucia is a garment worker who sews shirts for a sewing contractor. She supervises three other workers who also sew shirts alongside her. When her boss gets a big job, instead of hiring another three workers to get it done, she has to stay overnight three nights in a row and over a weekend to finish by the deadline. Her employer, who calls her a supervisor, misclassifies her

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5 These examples are from cases filed by legal advocates which resulted in settlements requiring that the parties' names and the litigation results remain confidential.

as an "executive" employee, and she receives no overtime pay.

The duties test applied to these cases contains a number of subjective elements, demands a comparative analysis of time spent on various activities, necessitates an evaluation of the degrees to which an employee has discretion, and requires subtle differences between management and working supervision. These elements of the test are difficult for judges, let alone low level, comparatively powerless, workers, to apply. The simpler salary basis test is a more accurate criteria of exempt status.

Low wage workers comprise a disproportionate share of the workforce. From 1979 to 1992, the low wage sector of the workforce grew an astounding 50%, now representing one in five workers.[6] Increasingly, workers classified as managers and administrators in growing industries such as retail and sales, are also finding themselves in low paying jobs. For example, the National Restaurant Association conducted a survey in 1994 which found that one-quarter of fast-food assistant managers earned less than $15,000[7] and from 1964 to 1992, supervisory employees in eating and drinking

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6 U.S. Department of Labor and U.S. Department of Commerce's Commission on the Future of Worker Management Relations, Fact Finding Report (May 1994). (Hereafter "Dunlop Commission Report").

7 Marc Linder, "Labor Department is Subverting Wage Law," in The National Law Journal, January 17, 1994.

establishments more than quadrupled, from 126,000 to 634,000.[8]

Low wage workers are also disproportionately women and members of racial and ethnic minority groups.[9] By the year 2005, women and racial minorities will be two-thirds of all new entrants to the workforce.[10] According to recent data from the U.S. Bureau of Labor Statistics, while women represent 48 percent of all managerial and professional workers, they are disproportionately working in lower paying jobs averaging 73 percent of the pay of men in managerial and professional jobs.[11] The pay differential is partially due to women tending to be concentrated in low-paying industries such as sales and retail jobs.[12]

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8 Marc Linder, "Closing the Gap Between Reich and Poor: Which Side is the Department of Labor On?", 21 New York University Review of Law and Social Change I, 22 (1993-94). U.S. Bureau of Labor Statistics, Bullet No. 2370, "Employment, Hours and Earnings," at 802-04 (1991).

9 U.S. Bureau of Labor Statistics, "The Earnings Ladder: Who's at the Bottom? Who's at the Top?" Statistical Brief 94-3(March 1994).

10 The "Dunlop Commission report" at 12.

11 U.S. Bureau of Labor Statistics, Current Population Survey, 1995 Annual Averages (Unpublished Data).

12 Conrad F. Fritsch & Kathy Vandell, Exemptions from the Fair Labor Standards Act: Outside Sales workers and Executive, Administrative, and Professional Employees in Minimum Wage Study Comm'n, Report of the Minimum Wage Study Commission, 245-248 (1981); Marc Linder, Ibid at 21.

The Eighth Circuit's ruling significantly impacts these low-wage workers in industries such as retail, food service, and sales, where the lines often merge between the work of entry-level workers and managers. Deliberate employer manipulation of the exemption, by merely deeming entry-level employees "exempt" as supervisors, even when they spend a good part of their time performing the same work as the people they supervise, permits the employer to avoid paying overtime, and indeed, avoid paying wages at all for the extra hours worked.[13] This dynamic flouts the purpose of the narrow executive exemption which recognized that the highest paid executives of a company had enough power (and wages) to dictate their own hours and working conditions.[14] The notion that assistant managers at fast-food restaurants and convenience store clerks have the requisite power to qualify them for the executive exemption as it was intended is absurd.[15] Again, the superior test of true exempt power, discretion and control is the salary basis test.

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13 The U.S. Department of Labor states in a 1940 report, "there is little advantage in salaried employment if it merely serves as a cloak for long hours and may well conceal excessively low hourly rates of pay." "The Stein Report" at 7 (1940).

14 Marc Linder, Ibid. at 17. ("executive connotations.")

15 Petitioners urge use of the "as a practical matter" test to determine the true nature of the employee's status. This use of the salary basis test would necessarily take into account the relative bargaining power of the employee and employer, and, in the case of the lower-level employees, recognize that the employer dictates the terms and conditions of work.

C. Mandatory Overtime and An Increasing Work Day Hurts Workers Contrary to the FLSA Worker Protection and Job Creation Goals.

Workers are being required to work longer hours for the same pay. Employers' need to stretch budgets is manifesting itself in a reconfiguration of the workforce, including "contracting out" certain job functions and hiring temporary workers in place of permanent employees[16], and lengthening the work day for those workers who are not the victims of mass layoffs and stay on as employees.[17] Researchers have established that Americans are spending more and more of their time working.[18]

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16 See, e.g., Richard S. Belows, "The Rise of the Contingent Workforce: The Key Challenges and Opportunities," 52 Wash. & Lee L. Rev. 863 (1995). See also, other articles in same volume, "Symposium on the Regulatory Future of Contingent Employment," 52 Wash. & Lee L. Rev. (1995). The rise of the "contingent" workforce creates an ease with which employers are able to manipulate shifts, job descriptions and job characterizations to minimize coverage of labor and employment laws. See, Jonathan P. Hiatt, "Policy Issues Concerning the Contingent Workforce," at 739,; Mary E. O'Connell, "Contingent Lives: The Economic Insecurity & Contingent Workers," at 889.

17 See e.g. Louis Uchitelle, "Fewer Jobs Filled as Factories Rely on Overtime Pay," in The New York Times, May 19, 1993; G. Paul Zachar, "Shortchanged: Many Firms Refuse to Pay for Overtime, Employees Complain," Wall Street Journal, June 24, 1996; Joan Rigdon, "Worn Out: Some Workers Gripe Bosses are Ordering Too Much Overtime," Wall Street Journal, September 29, 1994.

18 The Economic Policy Institute study by Case Western Reserve Assistant Professor Laura Lette-Guy and Harvard Professor Juliet Schor. Lette and Schor, "Assessing the Time Squeeze Hypothesis: Hours Worked in U.S. 1969-1989," 33 Indus. Rel. L. J. 25 (1994);

Juliet Schor's The Overworked American: The Unexpected Decline of Leisure[19] establishes the surprising fact that in the last twenty years the average employed American has seen his or her working hours increase by the equivalent of one month a year. This dramatic spurt has hit nearly everyone; men and women, professionals and low paid service workers, across every industry and in every occupation.

Total Annual Hours, Labor Force Participants

	1969	1987	Change 1969-1987
Market Hours			
All participants	1786	1949	163
Men	2054	2152	98
Women	1406	1711	305
Household Hours			
All participants	889	888	-1
Men	621	689	68
Women	1268	1123	-145
Total Hours			
All participants	2675	2837	162
Men	2675	2841	166
Women	2674	2834	160

This extra month's work per year decreases efficiency, increases stress on the worker, and leads to an unhealthy workplace.

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see also, Martin Moore-Ede, M.D., Ph.D., The Twenty-Four Hour Society: Understanding Human Limits In A World That Never Sleeps 1, 66-71 (1992) (explaining that human fatigue caused by working long or late hours accounts for many serious accidents, such as Three Mile Island, Exxon Valdez, and transportation accidents).

19 Juliet Schor, "The Overworked American: The Unexpected Decline of Leisure," Basic Books (1991), (hereafter Overworked).

Workers who are not in a position to bargain are forced to take the job as they find it, even if that means working long hours, with or without overtime pay. A recent radio advertisement on Spanish-speaking radio seeking 500 workers in West Texas for a job at a chicken processing plant in a Northern State described the job as "full time" and "permanent," but required workers to commit to working six days a week for twelve hours a day, Sundays "optional." If the worker were to take the job, it is difficult to imagine that she would be there for the long term; injuries and general burn out would likely result in a frequent turnover. The chicken processing company's strategy of recruiting from an agricultural worker community suggests that it expects a high turnover.[20]

The overtime provisions of the FLSA are designed to penalize employers whose individual employees work excessive hours, both to protect those employees working overtime, and to create jobs. The Eighth Circuit's countenance of employer abuse of exemption and creative misclassification of employees exploit the workers who are "lucky" enough still to have a job, and provide employers with an incentive not to hire additional workers. Low-wage workers and the unemployed suffer because they, the intended beneficiaries of the FLSA overtime provisions, lose out on the entry-level jobs that would have been created but for the FLSA violations.

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20 See Marc Linder, "I Gave My Employer a Chicken That Had No Bone: Joint Firm-State Responsibility for Line-Speed-Related Occupational Injuries," 46 Case Western Reserve L. Rev. 33 (Fall 1995).

II. A NEW LOOK AT THE BRANDEIS BRIEF JUSTIFIES STRICT HOURS OF WORK RULES.

Louis Brandeis inaugurated the argument for an hours of work standard, in the first case in which this Court upheld a state statute limiting the hours of work.[21] Muller v. Oregon, 208 U.S. 412 (1908). The original "Brandeis Brief" persuasively argued that protective hours of work statutes should be upheld for the public health, public safety and general well-being of women and society as a whole. Relying on over ninety national and international medical studies and committee reports, Brandeis found that long hours of labor cause bad effects on health, safety, morals and the general welfare. He further discussed the economic benefits of short hours. Although the 1908 Brandeis Brief and Muller decision are hopelessly outdated with regard to their views that women are weaker and inferior to men, Brandeis' reasons for enforcing a strict hours of work statute hold true, even after eighty-eight years.

Health. In analyzing the harmful effects of long hours on health, Brandeis found that fatigue from long hours of work becomes chronic, resulting in the deterioration of health, which in turn makes individuals more susceptible to disease. Brief at 28.

The negative effect of long hours on health remains prevalent in today's society. Long working hours are related to stress and injuries at the workplace. Juliet B. Schor, The Piper Lecture: Worktime In Contemporary Context: Amending The Fair Labor Standards Act, 70 Chi. Kent L. Rev. 157, 161 (1994) (hereafter "Piper Lecture"). According to the International Labor Office, job stress, which costs the United States $200 billion a year, is "'one of the most serious health issues of the twentieth century.'" International Labor Office, World Labor Report at 65-67 (1993), quoted in Piper Lecture at 161.

Safety. Brandeis also analyzed the bad effect of long hours on safety, noting that workplace accidents most frequently occur at the end of the day or at the end of a long period of work due to long hours. Brief at 42.[22]

The negative effects of long hours on safety still exist in all industries. For instance, between 1985-1991, United States automobile factories, which have extremely high overtime hours, suffered a 460% rise in workplace injuries.[23]

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21 Appendix A contains a full chronology of the FLSA and the Salary Basis Doctrine.

22 "[L]ess [work] is done in the tenth hour, by reason of weariness, than in other hours; and the work of the last hour, like overtime work at night, weakens a person for the next day. It is this weariness that causes accidents to occur two or three times as frequently in the last hour as in other hours. . ." G. L. Bohn, Getting a Living, at 407, quoted in Brief at 44.

23 United Auto Workers New Directions Movement, Forced Overtime: Killing the American Dream (1994), quoted in Piper Lecture at 161 n. 34; see Bureau of Labor Statistics, U.S. Department of Labor, 41 Employment & Earnings 108 (1994) (stating that motor vehicle and car bodies production and non-supervisory employees worked approximately 8.7 overtime hours per week).

Family Life. Brandeis emphasized that longer hours encroach upon family life. Brief at 47.[24] Family life is the core of society, and the weakening of the forty hour workweek means a weakening of the most basic unit in society, the family.

In 1905, the shortening of working hours was different for women and men since free time for women was not "resting time", as it was for men, but time to do the housework and attend to family life. Brief at 58.[25]

Similarly, in 1991, approximately two-thirds of women with children are employed.[26] In 1987, women's household hours were 1123. Men spent 689 hours doing household work.[27] This leaves families with little non-work time. The more hours spent at

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24 A 1900 New York Bureau of Labor Statistics Report found that if both working parents do not have the time to give their children enough attention, their generation will suffer irreparable harm. Report of the New York Bureau of Labor Statistics at 69 (1900), quoted in Brief at 48-49.

25 Reports of the Factory Inspectors, The Working Hours of Female Factory Hands, at 111, 113 (Berlin 1905); Boris, Home to Work, (Cambridge University Press, 1994); Boris and Daniel and Homemade, (University of Ill. Press, 1989).

26 Overworked at 1, 20; Bureau of Labor Statistics Memo, "Marital and Family Characteristics of the Labor Force from the March 1990 Current Population Survey," at 4 table 15 (Oct. 1990)).

27 Id. at 35, table 2.3 and at 37 n. 40 (construing John P. Robinson, "Who's Doing the Housework?" American Demographics, 10, 12 (Dec. 1988)).

work, the less with the family. American men and women both need family time.

Economics. Brandeis argued that the economic aspects of shorter hours outweigh any possible benefits derived from longer hours. Brief at 65. Again relying on numerous national and international reports, Brandeis argued that output declines with long hours, and shorter hours increase productivity and improve quality.[28]

Just as Brandeis warned against the dangers of exempting specific trades from the hours of work standards eighty-eight years ago, a warning sounds now that any claimed exemptions from the national hours of work standard must be narrowly read and strictly applied. Brandeis concluded that exemptions of special trades from the hours of work standard subjected employees to injurious overwork and destroyed the intent of an hours of work standard. Brief at 86.

Brandeis was right.

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28 Id.; see, e.g., 1886 Commission du Travail, Report of the Sessions of Inquiry into Industrial Labor, at 65 (Brussels 1887), quoted in Brief at 68 (concluding that "everything which makes the worker more strong, more healthy . . . more intelligent, etc. (and these will be the results of greater leisure . . .), make him also more productive. . . [introducing reforms] indicates strongly that the final result will be a very great increase of production with a shorter time period for work."); Report of the British Chief Inspector of Factories and Workshops (1893), quoted in Brief at 75 ("[An] [a]rgument[] against overtime . . . [is] [t]hat the work done during overtime is not equal, in amount or quality, to that done during the regular time.")

III. EXEMPTIONS CAN SWALLOW THE RULE.

Interpreting exemptions broadly ignores Congresses' intent and undermines the national hours of work standard. The standard only works if nearly the entire society lives by it. The Eighth Circuit's exemption rules threaten to swallow the hours standard. It portends an expansion of the exempted class in relation to the covered class, especially as compared to the relationship between all employees and the small class of high paid executive, top staff administration and true professionals anticipated in 1937.

A simple example best exemplifies that a liberal exemption standard, which is difficult to enforce and easy to abuse, creates a much larger exempt class in relation to the size of the covered class, thereby jeopardizing the FLSA's goals of job creation and discouraging long hours by requiring extra pay.

A Final Example:

Consider a 103 person catering business. Three people are involved at the very top of the firm. The boss does everything and leads every project. She is clearly an executive. Her immediate assistant is in charge of the books, personnel and all administrative tasks. He is an administrative assistant with internal management discretion. The firm's main draw is an ice sculpturist, an artist to the core and a true professional. The three control their own work and time. Under the rules in force, the remaining 100 earn $6.00 per hour for 40 hours a week but are paid time and one-half, or $9.00 per hour, for overtime. The firm is fully employed, and

all employees work a full 40 hour week. When the holiday season begins, extra work comes in beyond that which the three top people can do on their own, and the firm faces an important economic decision. Management must sit down and decide whether to pay current employees $9.00 per hour for the extra work or hire new employees at the $6.00 rate.

Before the next holiday season, the administrative assistant hears that the rules on overtime are becoming more liberal. He learns that a method exists which achieves broader exemptions. The firm divides its work force up into 20 teams of 5 employees on each team. Each team has a worker designated "sergeant" who works with and leads the team. The 20 sergeants are now designated exempt from the hours of work standard, just like the top brass. A total of over 20 percent of the workforce is now exempt. Again the team is fully employed. Everyone is working full time. Again the new work comes in. Now the firm has 23 employees who are available to do the work without the overtime payment. The administrative assistant explains that now the 23 exempt employees can easily absorb the extra work, exclaiming now "its free work." The firm faces no pressure to pay overtime or hire more employees. The work force gets no additional pay for their extra effort and no new jobs are created.

IV. THE DECISION OF THE EIGHTH CIRCUIT SHOULD BE OVERTURNED.

This case raises a technical issue concerning the application of FLSA exemption rules and the "salary basis" pay docking doctrine.

A. The "Subject To" Rule: §541.118(a)(5).

The Eighth Circuit appears to create a dilemma between a "merely hypothetical rule" and an "only actual" rule. It then appears to adopt the "only actual" rule. However, the better test provides that salaried status is lost only when the employees are "subject to" docking as a practical matter. (See Solicitor General's Amicus Curiae in Opposition to Certiorari).[29]

If the Eighth Circuit's reading of the "subject to" provision were upheld, an employer could permanently maintain a detailed attendance[30] or disciplinary[31] code

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29 "[T]he Employer has the burden of proving that the employees are paid on a salary basis, e.g., by showing that there have been only isolated instances in which disciplinary suspensions have occurred, or that suspensions have occurred only in unusual circumstances." See U.S. amici op. Cert. at 11. The employer did not carry this burden. See Petitioners' Brief.

30 In the private sector, the 29 C.F.R. § 541.118(a)(1), (2) and (3) rules on pay docking for part day personal absences continue to apply. The Eighth Circuit's "subject to" interpretation, of course, applies to that portion of the rule. This is significant because the result of the decision will impact the entire American workforce.

which subjects all employees to pay docking. The employer could then pay overtime wages only to those employees who were actually docked. This would lead to the obviously unintended result that employees who violate the rules and are actually docked would be entitled to overtime, while those who obey the rules would not receive such overtime. See Solicitor General's Brief in Opposition to Certiorari in Wisconsin v. Mueller, 54 F.3d 438 (7th Cir. 1995), cert. pending, (Case. No. 95-0586, January 10, 1996) at 2-4, and 6-7.

B. The "Window of Correction": 541.118(a)(6).

The Eighth Circuit's view of the "window of correction" would also lead to unintended results. An employer who deliberately makes deductions that are inconsistent with the salary basis test, and is then sued in an FLSA suit, could escape liability easily. Such a rule would rob the salary basis regulations of its teeth. See Solicitor General's Brief in Opposition to Certiorari in Martin v. Malcolm Pirnie, 949 F.2d 611 (2d Cir. 1991), cert. denied, 113 S. Ct. 298 (1992) at 30-32.

No employer should be allowed access to the "window of correction" unless the employer meets a burden of establishing that any deductions made were "inadvertent," that all deductions made were reimbursed as soon as they came to the employer's attention, and that the employer

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31 Both the part day docking and the disciplinary docking rule contain the "subject to" language. In the public sector, at least for the post-1991 period, disciplinary docking remains in force under 29 C.F.R. § 541.5d and § 541.118(a)(5).

has revised all of its rules, codes, policies, practices and procedures which leave no doubt that as a practical matter the affected employee will not be subject to such deductions in the future.

IV. CONCLUSION.

For the foregoing reasons, this Court should reverse the Eighth Circuit.

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APPENDIX

APPENDIX A

CHRONOLOGY ON FLSA AND THE "SALARY BASIS" DOCTRINE

1791. Philadelphia Carpenters First American strike for a ten hour day. (David R. Roediger and Philip S. Foner, Our Own Time 7 (Greenwood Press 1989)).

1834. Average work week 75 to 90 hours for laborers; journeymen push for 60 hour week. (W.S. Woylinsky, "Hours of Labor" in Encyclopedia of Social Sciences, Vol. III (1935)).

1840. President Van Buren issues executive order granting a ten hour day to government employees engaged in manual labor. Id. at 40.

1830's-50's Pressure to shorten work week for safety and protective reasons increases. Moved to 3150 hours per year. (Zeisel, "The American Work Week, 1850-56," 81 Monthly Labor Review 23-29 (1958)).

1868. Eight hour day for federal contractor enacted. (Roediger at 87).

1876. U.S. v. Martin, 94 U.S. 400 (1876). Vitiates 1868 eight hour day law for federal contractors by allowing individual agreements.

1890s. Women's action groups, led by Florence Kelly and Grace Abbott, push to limit hours of work. (Eileen Boris, Home to Work 81-122 (Cambridge University Press 1994); and Hunnicut, Work Without End, 20-23 (Temple University Press 1988)).

1898. Holden v. Hardy, 169 U.S. 366 (1898). Upholds eight hour day law for mine safety.

1905. Lochner v. New York, 198 U.S. 45 (1905). Strikes down limits on hours of work on freedom of contract grounds.

1907. Federal Hours of Service Act caps hours for railroads on safety rationale.

1908. Muller v. Oregon, 208 U.S. 412 (1908). Upholds hours of work regulation for women -- original "Brandeis Brief" filed.

1914. Howley v. Walker, 232 U.S. 718 (1914). Upholds women's hours law.

1915. F. Frankfurter and J. Goldmark, "Brief for the Defendant in Error; The Case for Shorter Work Day," (U.S. Supreme Court, Oct. Term (1915)).

1916. Federal Adams Act enacted eight hour day for railroads.

1917. Bunting v. Oregon, 243 U.S. 426 (1917). Upholds 10 hour day and seems to question Lochner; Wilson v. New York, 243 U.S. 332

(1917). Railway hours law is constitutional on safety grounds.

1920's. The five day week movement. (Hunnicutt at 18; and "Attitude of Certain Employers to the Five-Day Week," Monthly Labor Review, 23 (December 1923)).

1923. Adkins v. Childrens Hospital, 261 U.S. 525 (1923). Invalidates minimum wage for women; questions worker protection laws.

1935. Congress nearly enacts Black-Connery Bill which would have outlawed employing anyone over thirty hours per week. Postal Act of 1935 40 hour work week for postal employees. (Jonathan Grossman, "Fair Labor Standards Act of 1938," Monthly Labor Review 101, 25-26 (1978)).

1936. Moorehead v. New York, 298 U.S. 587 (1936) Invalidates state and federal wage and hour laws.

1937. West Coast Hotel v. Parrish, 300 U.S. 379 (1937). Upholds state minimum wage law.

June 25, 1938. FLSA, 29 U.S.C. §201 et seq. Enacted. Sponsored by 30 hour work week advocate Senator Hugo Black. Excludes Public Employees. (Grossman at 28).

1939. Wage and Hour Administrator presses view that "white collar" employees "as such are entitled to

benefits of the act." Coverage is presumed. Exemptions for "executives, administrators and professionals" are the true exceptions to the rule, are rare, and only allowed if employer meets heavy burden. See Wage and Hour Interpretative Bullet, No. 1, par. 5. (Jt. App. at 29).

April 1940 — 5 Fed. Reg. 4405 (1940) First regulatory annunciation of "salary basis" rule. (See, Jt. App. at 37).

October 10, 1940. — "Stein Report." (Jt. App. 20).

1941. — U.S. v. Darby, 312 U.S. 100 (1941). FLSA is constitutional.

1943-1945 — War Labor Board era special rule allows discipline to accommodate limits on labor supply and production demands of war. (Jt. App. 37-38).

August 24, 1944. — Wage and Hour Administrator Release A-9. Explains special war time rule. (Jt. App. at 37-38).

1945. — Phillips v. Waling, 324 U.S.,490, 493 (1945) Supreme Court rules FLSA exemptions narrowly construed.

1948. — Bauler v. Pressed Steel Car. Co., 81 F. Supp. 172 (N.D. Ill. 1948), aff'd 182 F. 2d 357 (7th Cir. 1950). Finds that a sergeant security guard at a war materials plant is non-exempt.

June 30, 1949. — "Weiss Report." War Labor Board era special rule on discipline dropped. Anti-docking rules revived. (Jt. App. at 39).

March 9, 1954. — Notice of Proposal Rule Making on 29 C.F.R. 541.118(a). Proposes current 541.118(a)(6), window of correction language, but says, in part, "penalties imposed for infractions of safety rules or for other major disciplinary reasons, will not affect salaried status." 19 C.F.R. 1321 (1954).

July 17, 1954. — Final rule adopted with exact current wording, stating "on the basis of the comments the provision that penalties may be imposed for major disciplinary reasons has been deleted, and the provision governing safety rules has been clarified." This rule remains unchanged to this day, except for the addition of the special exception for part day docking in the public sector adopted in 1991. 19 Fed. Reg. 4405 (1954).

October 15, 1966. — FLSA extended to public schools, hospitals, nursing home and local transit. 80 Stat. 83 (1966).

1968. Maryland v. Wirtz, 392 U.S. 183 (1968). Upholds constitutionality of 1966 extension.

1973. Employees of Department of Public Health v. Missouri, 411 U.S. 279 (1973). Disallows FLSA suits in federal court against state government by private parties leaves local governments, DOL suits, and state court suits by private parties.

May 1,
1974. FLSA extended to most state and local government employees. Includes Section 217(k) special schedules for public safety which extends the 40 work week to "the lesser of 216 hours or the average number of hours (as determined by the Secretary pursuant to section 6(c)(3) of the Fair Labor Stands Act of 1974) in tours of duty of employees engaged in such activities in work periods of 28 consecutive days in calendar year 1975." P. 88 Stat. 55 (1974). See, H.R. Rep. No. 93-913, 1974 U.S.C.C.A.N. 2811.

April 1,
1975. Current salary level adopted on interim basis. 40 Fed. Reg 27640 (1975).

1976. National League of Cities v. Usery, 426 U.S. 833(1976), holds FLSA public sector coverage unconstitutional.

April 7,
1978. Notice of Proposed Rule Making to increase salary level. 43 Fed. Reg 3779 (1978).

January 13,
1981. Final rule issued revising salary levels at close of Carter Administration. 46 Fed. Reg. 3013 (1981).

February 12,
1981. Final rule on salary level stayed by Reagan administration. 46 Fed. Reg. 11972 (1981).

March 3,
1982. Jones v. Donovan, Slip Op. 79-2973, 25 W.H. Cases 380, aff'd per curium, 675 F.2d 1340 (D.C. Cir. 1982). Held that the 186 hour 28 day work period initially established by DOL has failed to consider state and local employees as required by 207(k). DOL's recomputation for 1975 resulted in a 171 hour trigger for law enforcement.

February 19,
1985. Garcia v. San Antonio, 469 U.S. 528 (1985), reverses National League of Cities reinstating public sector coverage.

November 13,
1985. 1985 Amendments accommodate special concerns of public sector, reemphasize 7(k) schedule, authorize comp. time, clarify volunteers, exclude some public employees from coverage, and retroactively delay impact of Garcia, granting a years delay for public employers to comply. S. Rep. No. 99-159, 1985, U.S.C.C.A.N. 651. 99 Stat. 787 (1985).

November 19,
1985. Advance Notice of Proposed Rule Making. Continues indefinite stay; invites comments on Part 541. 50 Fed. Reg. 47696 (1985).

March 22,
1986. Comment period closes. Over 200 comments received. Majority from private sector; one third from trade associations within retail and service industry. Focus on salary level and duties test for professionals. Little or no comment on public sector, salary basis test or window of correction.

January 9,
1987. Special Enforcement Policy In Public Sector. DOL does not seek enforcement for part day docking violation in public sector. All other "salary basis" still applies. Private enforcement still open.

June 16,
1987. DOL issues Final Public Agency Rules under the 1985 Amendments. 52 Fed. Reg 2032 (1987).

September 10,
1987. DOL Policy Review Board looks at 1985 Part 541 Advance Notice.

1988. No decision. Policy debate continues within DOL and Administration.

Early
1989. Thirteen governors write DOL on concerns with FLSA.

July 27,
1989. DOL Secretary writes to Governors reaffirming present regulations and interpretations but requesting specific recommendations on Part 541, through 1985 ruling making process.

Late 1989
to early
1990. Twelve governors respond. Raise salary basis concerns among others.

November 15,
1990. Public Law 101-583 exempts computer professionals. Results in computer professional revision in Part 541.

July 11,
1990. 9th Circuit Abshire, 908 F.2d 483 (9th Cir. 1990), cert. denied, 111 S.Ct. 785(1991), decision applies "salary basis" test, generates comment.

February 27,
1991. Interim rule on computer professionals issue. 56 Fed. Reg. 39 (1991).

May 6,
1991. Eleven governors write Secretary request change in salary basis and administrative duties tests in public sector.

August 2,
1991 Legislation introduced on public sector "salary basis." S.1670.102d Cong. 1st Sess. (1991). Cong. Rec. S. 12,253.

August 16,
1991. DOL's 2nd Cir. Brief in Malcolm Pirnie, 949 F.2d 611 (2d Cir. 1991), cert. denied, 1135 S.Ct. 298 (1992).

September 6,
1991. Interim rule revises "part day docking" rule in public sector, maintains remainder of salary basis test. (Pet. App. 86a.) 56 Fed. Reg. 45824 (1991).

November 6,
1991. Comment period closes. 124 Cities, 46 counties and 29 governmental associations comment in favor; 25 public employee associations/unions comment opposed. No one presses window of corrections. Disciplinary docking rule raised and left in place.

November 20,
1991. 2nd Cir. Malcolm Pirnie, 949 F.2d 611 (2d Cir. 1991), cert. denied, 1135 S.Ct. 298 (1992), private sector DOL litigation decision emphasizes "subject to" salary basis rule and limits on window of correction. DOL strict position upheld.

1991-
1992. Legislation introduced in Congress on these issues; none becomes law.

May 7,
1992 Legislation introduced on public sector salary basis. H.R. 5112, 102d Cong., 2d Sess. (1992).

July 16,
1992. Sol. Gen. Supreme Court Opp. Cert. in Malcolm Pirnie, 949 F.2d. 611 (2d Circuit 1991), cert. denied, 113 S.Ct. 298(1992).

July 30,
1992. DOL Secretary Martin prepares and sends to Congress legislation to make regulatory revisions in public sector salary test in proposal of September 1991 retroactive. No sponsor found; bill not introduced.

July/August
1992 Legislation introduced on public salary basis. S. 3089.

August 19,
1992. 29 CFR 541.5d (1992) 57 Fed. Reg. 37666 (1992). Final Rule. (Pet. App. 184a).

September 16,
1992. House Subcommittee on Labor Standards hearing on application of Part 541 to public sector. Public employees object to DOL modifications; employers support DOL; National Association of Counties, National Governors Association, NPELRA testify do not emphasize disciplinary docking or window of correction issues. Private sector hearing discussed but never held. See also S. 3222.

November 9,
1992. Final rule on computer operators. 57 Fed. Reg. 197 (1992).

November 12,
1992. DOL considers staff drafts on "salary basis" rulemaking initiatives. No final action taken.

February
1993 Senate "salary basis" hearings.

March
1993. Legislation introduced in 102d Congress to revise salary basis; H.R. 1309 Rep. Andrews (D-N.J.).

May
1993. Ten Governors write DOL on "salary basis".

July 1,
1993. House Labor Standards Subcommittee hearings on "salary basis."

August 17,
1993. DOL 6th Cir. Brf. Reich v. Pierce, 1994 U.S. App. LEXIS 36194 (6th Cir. 1994).

August
1993. Legislation, S. 1354, introduced to revise "salary basis" test.

September
1993. OMB and DOL study on Part 541.

February/March
1995 Public sector "salary basis" legislation. H.R. 946 and S. 530.

April 11,
1994. Governor Wilson (Cal.) writes Secretary Reich requesting "salary basis" rulemaking as requested to Governor's Association in August 1993.

October 5,
1994. 9th Circuit SEIU v. San Diego, 35 F.3d 483 (9th Cir. 1994), voids pre-1991 salary docking.

November 14,
1994. Regulatory Agenda notice. Announces schedule for re-consideration of Part 541. Refers to salary level as "sorely out of date." 59 Fed. Reg. 57130 (1994).

December
1995 "Salary basis" and flex time legislation introduced. H.R. 2723.

January 17,
1995. DOL's 9th Cir. amicus in SEIU v. San Diego, 35 F.3d 483 (9th Cir. 1994).

May 8,
1995. Regulatory Agenda. Re-published November 1994's Part 541 notice verbatim. 60 Fed. Reg. 234544 (1995).

September 6,
1995. Congress enacts special public sector Court Reporter rules. P.L. 104-26 (1995).

November 28,
1995. Regulatory Agenda. May's Part 541 notice deleting "sorely out of date" reference to salary level. 60 Fed. Reg. 59608 (1995).

January 10,
1996. Sol. Gen. Supreme Court Opp. Cert. in Mueller v. Reich, 54 F.3d 438 (7th Cir. 1995).

January 23,
1996 FLSA, salary basis and docking applies to Congress. P.L. 104-1 (1995).

May 13,
1996. Regulatory Agenda. Republishes Part 541 notice with 1997 deadlines. 61 Fed.Reg. 23238 (1996). (Jt. App. 43).

No. 95-897

In The

Supreme Court of the United States

October Term, 1995

Supreme Court, U.S.
FILED
AUG 27 1996
CLERK

FRANCIS BERNARD AUER, *et al.*,

Petitioners,

vs.

DAVID A. ROBBINS, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF *AMICI CURIAE* INTERNATIONAL UNION OF POLICE ASSOCIATIONS, AFL-CIO, GRAND LODGE OF THE FRATERNAL ORDER OF POLICE AND THEIR AFFILIATES IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. *The FLSA Post-1991 Salary Basis Test & The Public Sector.* Does the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 *et seq.*, salary basis/disciplinary docking test, 29 C.F.R. § 541.118(a)(5), remain applicable in the public sector after the Department of Labor's 1991/1992 revision of 29 C.F.R. § 541.5d?

2. *The FLSA Salary Basis Pay Docking Rule: "Subject to" or "Actual."* Does a clear, intentionally established, disciplinary code subjecting employees to non-safety discipline for less than a full pay period prevent exemption under 29 C.F.R. § 541.118(a)(5)?

3. *The FLSA Salary Basis "Window of Correction".* Is employer entitlement to the 29 C.F.R. § 541.118(a)(6) "window of correction," which permits an employer to escape the loss of an FLSA exemption for impermissible pay deductions, limited to cases where there is (a) actual inadvertence, (b) full reimbursement immediately upon discovery, *and* (c) full revocation of all code, rules, practices or procedures subjecting the employees to impermissible deductions?

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Contents	ii
Table of Citations	iii
The Interest of the *Amici Curiae* FOP and IUPA	1
Statement of the Case	6
Argument	8
I. The Fair Labor Standards Act and Its Salary Basis Test Are a Safety Measure in Law Enforcement.	8
A. Crime and Crime Fighting Strategies, Hours of Work, and Law Enforcement Stress.	8
B. The Congressional Design of the FLSA Hours of Work Standard for Law Enforcement.	16
C. FLSA Dual Goals of Expanded Work Force and Improved Working Conditions.	18
II. The Salary Basis Test Is a Crucial Component to Preserving the National Hours of Work Standard for Law Enforcement Officers.	23
A. The Salary Basis Test and Its Disciplinary Docking Rules: Reasonable Standards, and a Necessary, Objective Test of Exempt Status.	23

Contents

	Page
B. The "Subject to" Docking Rule in 29 C.F.R. § 541.118(a) As A Practical Matter	24
C. The "Window of Correction" and Voluntary Employer Compliance.	27
Conclusion	28

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Contents

	Page
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Contents

	Page
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Page

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THE INTEREST OF THE *AMICI CURIAE* FOP AND IUPA

The *amici* organizations represent the majority of working law enforcement officers in the United States. The only other such national organization, National Association of Police Organizations, has filed a separate brief in support of Petitioners. The *amici* have obtained consent from both parties to file this brief. This brief supports the Petitioners' argument that the decision of the Eighth Circuit should be reversed.

The Grand Lodge of the Fraternal Order of Police is an international organization of full-time law enforcement officers employed by federal, state or local government agencies. It's 1,982 local lodges comprise a total membership of 265,451 active members. The Fraternal Order of Police was founded in 1915 in Pittsburgh, Pennsylvania and is currently incorporated under the laws of the State of Pennsylvania. The Grand Lodge serves 39 affiliated state lodges (Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, D.C., Florida, Georgia, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia and Wyoming). The Grand Lodge also has two international affiliates in Canada and Ireland. The Grand Lodge Auxilary was formed in 1941. The Grand Lodge of the Fraternal Order of Police has its headquarters housed in Nashville, Tennessee, and maintains offices in Washington, D.C., as well.

It historically has been, and continues to be, a responsibility of the Grand Lodge to educate members on issues that may impact the terms and conditions of employment afforded law enforcement professionals. As part of fulfilling that responsibility, the Grand Lodge informs members about national legislation affecting those areas, as well as crime control measures, and attempts to influence such legislation. Included

among such matters is the Fair Labor Standards Act ("FLSA").

The Grand Lodge is governed by a Board of Directors composed of National Trustees elected by each respective state lodge and an Executive Board composed of the President, 1st Vice-President, 2nd Vice-President, Secretary, Treasurer, and Sergeant-at-Arms. The members of the Executive Board are elected by the delegates present at Biennial Conference of the Grand Lodge.

The St. Louis Police Officers Association, FOP, represents 1,300 police officers in the St. Louis Police Department. It is affiliated with the Grand Lodge of the FOP through the Missouri Lodge.

The International Union of Police Associations, AFL-CIO, is the law enforcement parent of the police unions within the American Federation of Labor and Congress of Industrial Organizations. It is composed of three hundred and seven affiliated police unions and associations representing over 80,000 street level law enforcement officers in over four hundred law enforcement agencies throughout the United States, Canada and Mexico. The IUPA regularly represents the rights of individual law enforcement officers concerning their wages, hours, benefits, professional standing, and legal rights. IUPA and its affiliates have been involved in more than 40 Fair Labor Standards Act ("FLSA") enforcement actions through out the country.[1]

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1. *E.g., Clancey v. Alexandria*, 720 F. Supp. 1230 (E.D. Va.), *aff'd*, 912 F.2d 463 (4th Cir. 1989); *Rutledge v. Jackson*, Case No. J87-0342(W) (S.D. Miss. Nov. 3, 1989); *Milwaukee Police Association v. Milwaukee*, Case No. 88-C-412 (E.D. Wisc. 1990); *Kessler v. Howard County*, Case No. 92-1098 (4th Cir. 1992); *PPOA v. Los Angeles County*, Case No. Civ. 91-1772 WJR (GHKX) (C.D. Cal. April 13, 1992); *Amshey v. United States*, Case No. 583-86 (Fed. Cl. Ct. 1992); *Ahern v. New York*, 807 F. Supp. 919 (N.D.N.Y. 1992); *Shockley v. Newport News*, 997 F.2d 18 (4th Cir. 1993); *Moreau v. Klevenhagen*, 508 U.S. 22 (1993); *DeBraska v. Milwaukee*, Case No. 96-C-402 (E.D. Wisc.) (case pending).

The IUPA's Executive Officers are President Sam Cabral, Secretary-Treasurer Rich Estes and Vice President Art Reddy. Fifteen members of the Executive Board are elected by the members' delegates nationwide. The IUPA meets in Convention biannually and holds a National Conference in the intervening years.

The I.U.P.A. assisted St. Louis Police Fraternal Organization, represents the majority of Sergeants and Lieutenants in the St. Louis Department.

Law and order and the need for increased, reformed vigilance by working law enforcement is a clear national priority. Similarly, America needs a national hours of work standard for our working law enforcement officers to ensure both sufficient and vigilant law enforcement coverage. The FLSA sets that national hours of work standard for law enforcement at up to 171 hours in a 28 day period. 29 U.S.C. §207(k).

Broad, liberally construed, easily obtained exemptions from the national hours of work standard undermine the standard itself by, as happened here, exempting a large middle segment of the work force. The larger the segment exempted from the standard, the more easily the standard itself is defeated and its very purposes are undermined.

The limited resources,[2] and related public sector non-

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2. The Government Accounting Office reported that the time spent on FLSA enforcement declined from 558 staff-years in 1981 to 474 staff years in 1984. U.S. General Accounting Office. *Report to the Chairman Subcommittee on Labor Standards Committee on Education and Labor House of Representatives: The Department of Labor's Enforcement of the Fair Labor Standards Act* (September 30, 1985). Since the initial enactment of the Fair Labor Standards Act Amendments of 1985, which most recently brought public safety employees under a national hours of work standard, the budget of the Wage and Hour Division of the Department of Labor has continued to decline, its staff has continued to be depleted, and its enforcement authority

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enforcement policy of the U.S. Labor Department's Wage and Hour Division,[3] leaves enforcement responsibility of the

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remains limited. For example, during fiscal year 1989, the Department had sufficient resources to conduct almost 76,000 investigations. Just one year later, that number decreased such that it investigated barely 74,000 complaints. *See* U.S. Department of Labor Employment Standards Administration, *Minimum Wage and Maximum Hours Standards Under the Fair Labor Standards Act: Report to the Congress Required by the Fair Labor Standards Act 1991 Section 4(d)(1)*(1989) and (1993). These reductions continue with each new federal budget.

In addition, the majority of the Department's resources must be spent in the private sector. In both 1989 and 1990, of the more than 70,000 complaints investigated by the DOL, less than 2,000 were in the public sector. *Id.*

3. On November 19, 1985, the DOL published an Advance Notice of Proposed Rulemaking in the Federal Register seeking comments concerning the salary basis test. A representative of public employers commented that due to state and local laws governing public accountability, some public employers were required to make part-day deductions for all employees without distinction. As a result of this comment, the Department of Labor declared on January 9, 1987, that it would not enforce the part-day docking portion of the salary basis test against any public sector employee *who otherwise met the requirements for exempt status*, provided the applicable state or local law *required* the employer to deduct pay for absences of *less than a day* for public accountability reasons. *See* DOL Opinion Letter Ruling, January 9, 1987.

DOL's nonenforcement policy did not affect the employee's right to go to court to enforce all parts of the Fair Labor Standards Act including the part-day docking section of the salary basis test. 29 U.S.C. § 216(b). The remaining portions of the salary basis test, including the disciplinary docking rule, remained in effect and enforceable. 29 C.F.R. § 541.118(a)(5). Pet. App. at 82a.

However, the non-enforcement policy had the unintended consequence

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exemption provisions of the Act as they apply to law enforcement solely up to individual law enforcement employees and their organizations.[4] The Grand Lodge of the Fraternal Order of Police and the International Union of Police Associations, AFL-CIO, take that responsibility seriously and have been active in efforts to enforce the Act.

The Grand Lodge of the Fraternal Order of Police regularly publishes a Fair Labor Standards Act Update and provides seminars on FLSA across the country. The International Union of Police regularly publishes an FLSA handbook entitled *Policing Your Paycheck*, runs annual conferences and seminars on enforcement and provides legal counsel in FLSA litigation through its office of general counsel.

The *amici* are keenly interested in continued strict enforcement of a national hours of work standard for working law enforcement officers and strict and narrow application of exemption from that standard.

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of placing the FLSA enforcement burden on individuals and organizations such as the *amici* which generated a situation in which, as the United States explained in its *amicus curiae* brief, most of the twenty-seven Court of Appeals "cases upon which petitioners rely were decided without a clear statement by the Department of Labor." *See* Solicitor General's *Brief for the United States Amicus Curiae* (May 1996).

4. Since the DOL's nonenforcement policy of 1987, private party enforcement under 29 U.S.C. § 216(b) has been the only litigation enforcement of the FLSA exemption standards as they apply to law enforcement employees. *E.g., Shockley v. Newport News*, 997 F.2d 18 (4th Cir. 1993); *Hurley v. Oregon*, 27 F.3d 392 (9th Cir. 1994); *Bankston v. Illinois*, 60 F.3d 1249 (7th Cir. 1995); *see also*, n. 3.

STATEMENT OF THE CASE

The Petitioners in this case are 289 Sergeants and one (1) Lieutenant of the St. Louis Police Department, St. Louis, Missouri. The St. Louis Police Department has, at all relevant times, treated the Sergeants and Lieutenants as exempt from the overtime provisions of the FLSA. Although the Sergeants and Lieutenants work in excess of the statutory maximum hours, they are not paid for that work except in unusual circumstances, as when they are working under federal grants.[5] J.A. at 79.

Despite the cursory designation of the Sergeants and Lieutenants as exempt, the St. Louis Police Department has an express policy which subjects the Sergeants and Lieutenants to disciplinary deductions in pay of less than one week for any of approximately 40 different Departmental violations. *See* Pet. App. G., 102a. Sergeants in St. Louis are in fact suspended for periods of less than a week for disciplinary reasons. J.A. 48-57, 60-62, 85-87. The Petitioners' sick leave, vacation pay, and recreation pay are all calculated and used on an hourly basis. J.A. at 11, 47 and 58. Sergeants and Lieutenants receive shift differential pay for each hour worked during the "midnight" shift. J.A. at 77.

The St. Louis Police Department has never completely reformed its policy of subjecting Sergeants and Lieutenants to disciplinary deductions in pay of less than one week. In addition, the Department intends to maintain its two day deduction from Sgt. Guzy until given a final order by the courts to reimburse him.

The Petitioners brought this suit in the United States District Court for the Eastern District of Missouri on October 25, 1988

5. Law enforcement Sergeants and Lieutenants in the federal sector are covered by the salary basis test and its "subject to" discipline rule and are non-exempt. *See Amshey v. United States*, 26 Cl. Ct. 582 (Fed. Cl. Ct. 1992).

challenging the Department's treatment of them as exempt under the FLSA. Pet. App. 68a-102a. On August 26, 1994, the District Court found that all but two Sergeants' positions were exempt. Pet. App. 67a-68a. On September 8, 1995, the Eighth Circuit affirmed the decision and reversed the decision in part ruling that all the Sergeants' positions were exempt. Pet. App. 1a-36a.

Although the District Court did not expressly discuss the salary basis test, except in its 1991 summary judgment decision for Lt. Delgado, the Eighth Circuit ruled that the Sergeants are salaried because "[t]he mere possibility of an improper deduction in pay does not defeat an employee's salaried status." Pet. App. at 8a. The Court did note, however, that "an employee is considered nonsalaried, and thereby entitled to overtime compensation, if his compensation is subject to reduction for a violation of any other [non-safety] rules." Pet. App. at 9a. The Court concluded that although "[*a*]*rguably*, the department's two-day pay deduction from Sergeant Guzy would require him to be treated as a nonsalaried employee," the Department could avail itself of the "window of correction." Pet. App. at 9a (emphasis added). According to the legal conclusions of the Eighth Circuit, Sergeant Guzy's deduction was a unique, one-time deduction, whether intentional or not, and therefore, was not according to an established policy. The court further noted that the residency rule had been changed, without mention of the remaining unchanged 39 disciplinary rules. Pet. App. at 10a. The Court declared that Guzy's deduction fit within the "window of correction" because the deduction was " 'for reasons other than for lack of work.' " Pet. App. at 10a.

ARGUMENT

I.

THE FAIR LABOR STANDARDS ACT AND ITS SALARY BASIS TEST ARE A SAFETY MEASURE IN LAW ENFORCEMENT.

A stringent salary basis test which strictly limits the escape routes from a reasonable, well tailored hours of work standard is not simply or even primarily, intended to protect employee entitlement to overtime pay. The national hours of work standard is and always has been primarily a health and safety, and employment expansion regulation. At the turn of the last century, hours of work rules were upheld by this Court to protect women and children, *Muller v. Oregon*, 208 U.S. 412 (1908); *Howley v. Walker*, 232 U.S. 718 (1914), and to protect miners and railway workers, *Holden v. Hardy*, 169 U.S. 366 (1898); *Wilson v. New York*, 243 U.S. 332 (1917), and later to protect broader citizen access to the workplace and to safety in it once there. *United States v. Darby*, 312 U.S. 100 (1941). Today, no less than any other time in history, a national hours of work standard is crucial. Schor and Leete, "Assessing The Time Squeeze: Hours of Work in the United States, 1969-1989," 33 *Indus. Rel. L. J.* 25 (1994); Bureau of Labor Statistics, U.S. Department of Labor, 41 *Employment and Earnings* 67 (1994). Such a standard protects the safety of law enforcement officers and fosters the law enforcement goals they strive to achieve.

A. Crime and Crime Fighting Strategies, Hours of Work, and Law Enforcement Stress.

The increase in crime coupled with new anti-crime strategies call for more law enforcement hours of work on the street. With the increase in need for law enforcement in our

society, law enforcement officers experience an increase in hours of work and increased on-the-job stress. A strong national hours of work standard fosters both increased manpower and officer safety.

Crime. In relation to the amount of crime, the United States employs less than 10% of the police presence on the street than it did thirty years ago. In the 1960's the United States as a whole employed 3.3 police officers for every violent crime reported per year. In 1993, it had 3.47 violent crimes reported for every police officer. To return to the ratio of police to violent crimes we experienced in the 1960's, we would have to add approximately five million police officers to the street. Today, a police officer must deal with 11.45 times as much violent crime as his or her predecessor dealt with even two decades ago. *See* Adam Wallinsky, "The Crisis of Public Order," *The Atlantic Monthly*, 39 (July 1995).

By way of example, in Milwaukee in 1965, there were twenty-seven murders, thirty-three rapes, and 214 robberies. In 1990, when the population was smaller, there were 165 murders, 5,988 rapes and 4,472 robberies. In New Haven, Connecticut in 1960, only six murders, four rapes and sixteen robberies were reported. By 1990, when the population was reduced by 14%, New Haven reported thirty-one murders, 168 rapes and 1,684 robberies. *Id.* at 41. Unfortunately, these increases are reflected nationwide.

Anti-Crime Strategies: "Broken Windows" and Community Policing. Some reductions in crime have been experienced very recently. Compare, for example, cover stories from *Time*, "Law and Order: Why Cops Turn Violent," (April 1, 1991) and "Finally, We're Winning The War Against Crime: Here's Why" (January 15, 1996). Those reductions are the result of a slight increase in the numbers of officers and a large increase in their

hours on the street.[6] They also reflect the application of two seemingly opposing strategies — the "broken windows" theory dominant recently in New York City and the "community policing" theory dominant in Philadelphia, Los Angeles and elsewhere.[7]

The "broken windows" approach, initially developed in 1982 by Harvard's James Q. Wilson and Northeastern University's George L. Kelling, argues that minor violations create disorderly environments that encourage more serious

6. For example, a study performed by the Milwaukee Police Department revealed that while in 1988 the total overtime hours for the Department amounted to 119,137 hours, just five years later in 1993, the total overtime hours for the Department amounted to 176,824 hours. *See* Memorandum of Milwaukee Budget and Management Director (July 1993) (copy on file).

In 1987, the average overtime hours per police officer in a population with 1,000,000 or more citizens was 66.0 hours per year. U.S. Bureau of Justice Statistics, *Police Departments in Large Cities, 1987*, Special Report (1989). By 1993, the average officer in the Houston, Texas Police Department, where Sergeants are treated as non-exempt and receive overtime pay for example, worked more than 108 hours of overtime per year. Similarly the average Cincinnati, Ohio Police Officer, including Sergeants who are treated as non-exempt and receive overtime pay, worked in excess of 189 overtime hours. U.S. Bureau of Justice Statistics, *Law Enforcement Management and Administrative Statistics, 1993: Data for Individual State and Local Agencies with 100 or More Officers* (1995). The Houston officers worked an average of 179.3 hours per 28 day period, or more than an extra day per cycle. The Cincinnati officers worked an average of 185.5 hours per 28 day cycle or almost two days more than the FLSA hours of work standard which reflects the DOL's study of the average number of hours the average officer worked in 1975. For full national data, *see supra.* and Bureau of Justice Statistics, *Law Enforcement Management and Administrative Statistics, 1990: Data for Individual State and Local Agencies with 100 or More Officers* (1992).

7. National Institute of Justice, U.S. Department of Justice, *Community Policing For Safe Neighborhoods 2000: Partnerships for the 21st Century*, (1993).

crimes.[8] The analogy is to the abandoned building in which broken windows go unrepaired which soon deteriorates to the mile square slum. New York City Mayor Rudolph Giuliani and Police Commissioner William Bratton implemented a "broken windows" approach in May 1994 by mapping crime patterns and responding quickly and directly to even the smallest violations. The system is credited for a two year decline in crime in all New York precincts — murder is down 39%, auto theft 35%, robbery off by a third.[9]

Community policing or "problem oriented policing" developed, in large part, by University of Wisconsin's Henry Goldstein and fostered by the U.S. Justice Department's Office of Community Oriented Policing Services, takes what seems a different approach. It emphasizes putting more officers on the street, in the community, and on foot patrol. It fostered the Norman Rockwell "soda fountain/cop with a kid" model, night basketball, neighborhood improvement and police presence as crime prevention strategies. Cities and towns nationwide — including Boston, Houston, Philadelphia and Tulsa — are adopting community oriented policing.

The beat cop is back. Communities work to build rapport between law enforcement officers and neighborhoods. When the citizens of a neighborhood and their regularly assigned law enforcement officer know each other, it is more difficult to break the law. This theory puts more cops on the street and encourages

8. George L. Kelling and James Q. Wilson, "The Police and Neighborhood Safety," *Atlantic* 29 (March 1982); Wes Scogan, *Disorder and Decline: Crime and the Spiral of Urban Decay* (New York Basic Books) (1990).

9. *See* n. 8, *supra.*; and Richard Lacayo, "Finally, We're Winning The War Against Crime: Here's Why," *Time*, 48 (January 15, 1996)

their total involvement in the community.[10] Community Policing too has been effective. Madison, Wisconsin's south side reported a 14% reduction in property crimes between 1987 and 1989 under the program. A western Houston neighborhood recorded a 38% drop in serious crime over a six month period in 1988.[11] The Justice Department has found similar success to other cities.[12]

Whether a "broken windows" or "problem oriented" policing model is used, reformed policing involves pressure for more policing, more total hours on the street, more pressure on those in law enforcement and a greater need for protection against officer stress. Every law enforcement agency in which the FOP and the IUPA have members is struggling with both the crime problem and the remedial programs it generates. Everywhere cops are working harder, longer hours under increasing stress.

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10. *See, e.g.*, Wadman, Olson, *Community Wellness: A New Theory of Policing* (1990); Goldstein, *Problem Oriented Policing* (1990); Goldstein and Susmilch, *The Problem Oriented Approach to Improving Police Service, A Project on Development of a Problem Oriented Approach to Police Service* (1981); Green and Mastrofski, *Community Policing: Rhetoric or Reality* (1988); Kelling, *Police and Communities: The Quiet Revolution*, National Institute of Justice and Harvard (1988); Pierce, Spaar and Briggs, *The Character of Police Work* (1984); and Reiss and Tonry (eds.), *Communities and Police* (1986).

11. Lance Morrow, "Back to the Beat," *Time*, 22 (April 1, 1991).

12. *See* National Institute of Justice, *Problem-Oriented Policing*, (January 1987); National Institute of Justice, *Community Policing in Seattle: A Model Partnership Between Citizens and Police*, (August 1992); U.S. Department of Justice, Office of Community Oriented Policing Services, *Problem-Solving Tips A Guide To Reducing Crime And Disorder Through Problem-Solving Partnerships* (June 1996).

Longer Hours & Police Stress. Longer hours increase law enforcement stress and that stress undermines the very programs which the longer hours are attempting to improve. The officer that presses to do more and do it better is the officer most likely to succumb to stress. This Court recently recognized that "police officers engaged in the dangerous and difficult tasks associated with protecting the safety of our communities not only confront the risk of physical harm but also face stressful circumstances that may give rise to anxiety, depression, fear, or anger." *Jaffee v. Redmond*, __ U.S. __, 116 S. Ct. 1923, n. 10 (1996).

Dr. Lawrence Blum, Ph.D., a clinical psychologist who has specialized in the treatment of law enforcement officer stress for over 16 years, has documented the dominant role that long and unpredictable work hours play in police stress. Dr. Blum conducted a study of Milwaukee's police officers. Blum, "Final Report Milwaukee Police Association, Interest Arbitration Hearing, City of Milwaukee 1994/1995 Labor Contract," 1994.[13] In the study, Dr. Blum received clinical data and questionnaire responses of approximately 1,000 police officers and conducted a review of the literature on stress, occupational stress, and police stress.[14]

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13. Report available from Dr. Lawrence N. Blum, Ph.D., Inc., Clinical Psychologist, 540 North Golden Circle Drive, Suite 115 Santa Ana, CA. 92705.

14. *E.g.*, White, Biggerstaff and Grubb, *Factors of Stress Among Police Officers*, 12 Criminal Justice and Behavior, 111 (1985); Singleton and Teahan, *Effects of Job Related Stress on the Physical and Psychological Adjustment of Police Officers*, 6 Journal of Police Science and Administration, 355 (1978); Heiman, *Suicide Among Police*, 134 American Journal of Psychiatry, 1286 (1977); Anson, and Bloom, *Police Stress in an occupational context*, 16 Journal of Police Science and Administration, 229 (1988); French, *A Comparative Look at Stress and Strain in Policemen* in *Job Stress and the*

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Exceedingly high percentages of officers reported experiencing continued and repeated stress reactions such as

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Police Officer: Identifying Stress Reduction Techniques (1975); Cooper, *Stress in the Police Service*, 24 Journal of Occupational Medicine, 30 (1982); Greller, *Police Stress: Taking a Department-Wide Approach to Managing Stressors*, The Police Chief, 44 (1982); Grencik, *The Physical Fitness of Deputies Assigned to Patrol Function and its Relationship to the Formulation of Entrance Standards*, LEAA Final Report (1973); Grenrick, *Towards an Understanding of Stress in Job Stress and the Police Officer: Identifying Stress Reduction Techniques* (1975); Hageman, *Occupational Stress of Law Enforcement Officers and Marital and Familial Relationships*, 6 Journal of Police Science and Administration, 402 (1978); Hageman, *Responses of Police Rookie Officers to Stress*, 10 Journal of Police Science and Administration, 235 (1982); Johnson, *A Comparative Study of Stress Between Police Officers and Correctional Officers*, Master of Criminal Justice Thesis (1987); Kroes, *Psychological Stress and Police Work*, Paper presented at the Third Annual Symposium of the American Academy of Stress (1974); Kroes, *Society's Victim: The Policeman: An Analysis of Job Stress in Policing* (1975); Kroes, *Society's Victim: The Policeman* (1976); Kroes, *Job Stress and the Police Officer* (1975); Langone, *When Cops Crack Up*, Discover, 84 (1981); Lewis, *Toward an Understanding of Police Anomie*, 1 Journal of Police Science and Administration, 484 (1973); Maslach, *Burned-Out Cops and Their Families*, Psychology Today, 59 (1979); Niederhoffer, *The Police Family: From Station House to Ranch House* (1971); Selye, *Police Stress*, 1 Police Stress Magazine, 1 (1981); Skolneck, *A Sketch of the Policeman's Working Personality*, Criminal Justice-Law and Politics (1972); Sparrow, *Coronary Heart Disease in Police Officers Participating in the Normative Aging Study*, 118 American Journal of Epidemiology, 508 (1983); Speilberger, *The Police Stress Survey: Sources of Stress in Law Enforcment*, Human Resources Institute, (1980); Stratton, *Post-Traumatic Stress: Study of Police Officers Involved in Shootings*, Psychological Reports, 127 (1984); Tang, *The Effects of Hardiness, Police Stress, and Life Stress on Police Officers' Illness and Absenteeism*, 21 Public Personnel Management, 493 (1992); Violanti, *The Police Stress Process*, 11 Journal of Police Science and Administration, 112 (1984); Violanti, *The Police Stress Process*, 11 Journal of Police Science and Administration, 389 (1983); Wallace, *Stress and its Impact on the Law Enforcement Officer*, 4 Campus Law Enforcement Journal, 36 (1978). *See also* Standfast, "Focus on Stress: The Police Supervisor and Stress." *Prodigy Web Browser* (May 1996).

fatigue, even after rest, trouble falling asleep, multiple awakenings when trying to sleep, stiff painful feeling in muscles without injury, heart burn, being easily irritated or annoyed, feelings of nausea or sour stomach and backache or muscle spasm without injury. Dr. Blum found that these symptoms are caused by police officers' bodies excessive prolonged maintenance in a "fight or flight" condition in which the body secretes excessive adrenaline, noradrenaline, adrenocorticotropic hormone and cortisol.

In a follow up 1996 study, "The Impact of Hours of Work On Police Officers," Dr. Blum documents that these stress conditions are greatly aggravated by long and unpredictable hours.[15] A critical element of a program to remedy and control law enforcement stress is regular work hours and a standardized limited hours of work regime.[16]

15. Report Available from Dr. Blum, *see* n. 13 *supra*; *see also*, Martin Moore-Ede, M.D., Ph.D., *The Twenty Four Hour Society: Understanding Human Limits In A World that Never Sleeps* (1992). Dr. Moore-Ede explains that using overtime to perform additional work instead of bringing on new employees results in severe costs to the employer in terms of "increased fatigue and risk of human errors of inattention." *Id.* at 114. He explains that human fatigue as a result of working extended hours or shift work accounts for many serious accidents including Three Mile Island, Chernobyl, Exxon Valdez, numerous airline crashes and dozens of trucking accidents. *Id.* at 66-71. Finally, such hours result in increased societal health costs in increased gastrointestinal problems, chronic sleep disorder, cardiovascular disorder and other chronic illness. *Id.* at 70-75; *see also* Fairfax Coalition of Police study of *The Negative Effects of Rotating Shifts on Police Officers* (1991) (documenting more than 50 scholarly works addressing the physical and societal harms to working police officers from long, irregular, and unpredictable hours of work, including Colligan, "Extended Work Hours and the Compressed Work Week," National Institute for Occupational Safety & Health (1984); National Institute of Justice, *Police Work Schedules* (1990)).

16. The FLSA strict hours of work standard was Congress' chosen

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Individual police officers' health and the community's safety are inextricably tied to the hours of work of police officers. Just as the unhealthy and unsafe work hours of children and women fueled legislation, litigation, and Supreme Court precedent at the turn of the century; and, just as major issues in railway and mine safety brought hours of work issues before the court early in this century; the health and safety concerns surrounding modern day law enforcement issues bring the need for strict application of an hours of work standard in policing, with narrowly construed exemptions, to the Court now.

B. The Congressional Design of the FLSA Hours of Work Standard for Law Enforcement.

In 1974, recognizing the special needs of law enforcement and desiring to create a strong national hours of work standard for law enforcement, Congress ordered the Secretary of Labor to develop a special hours of work standard for law enforcement. 29 U.S.C. § 207(k). Accordingly, in place of the general national standard of a 40 hour work week, the Secretary developed a 171 hour in a 28 day cycle standard on the basis of an empirical study of the actual hours worked by American law enforcement in 1975.[17]

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method to "eliminate low wages *and long hours* . . . that were detrimental to the health and well being of workers." *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 727 (1947) (emphasis added); *see also Barrentine v. Arkansas-Best Freight System*, 450 U.S. 728, 734 (1981); *see also* n. 15, *supra*.

17. In 1974, Congress amended the FLSA to apply in the public sector. P.L. 93-269 (1974). As part of those amendments, Congress ordered the Secretary to conduct a study within federal, state and local law enforcement to determine the appropriate national hours of work standard for law enforcement officers to be effective January 1, 1978. In 1976, however, the Supreme Court decided *National League of Cities v. Usery*, 426 U.S. 833 (Cont'd)

After this Court's decision in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), Congress tailored the FLSA coverage of public safety employees to the particular concerns raised by public employers and employees in extensive hearings and congressionally sponsored negotiations between representatives of public employers and employees.[18] *See* P.L. 99-150, 99 Stat. 790 (1985). The Secretary of Labor played an active and significant role in that legislative process including agreeing to delay enforcing the *Garcia* decision until Congress formulated and passed the 1985 Amendments.

The carefully tailored amendments applied the longer more flexible 171 hour, 28 day law enforcement standard to state and local governments. Additionally, Congress allowed

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(1976) in which it struck down the 1974 amendments. Therefore, the Secretary conducted the study based upon federal law enforcement information only. The Court of Appeals for the D.C. Circuit found that the Secretary failed to abide by Congress' direction and ordered the Secretary to recalculate the hours of work standard using the information from state and local governments as well. *Jones v. Donovan*, slip. op. 79-2973, 25 W&H Cases 380 (D.D.C. 1981), *aff'd mem.*, 675 F.2d 1340 (D.C. Cir. 1982). DOL then conducted a study in which it obtained both the scheduled hours and the overtime hours worked and combined this data with the federal data it had obtained to determine that police officers, on average, were working 171 hours per 28 day cycle. Significantly, in reaching this calculation, DOL considered the number of straight time *and overtime hours* worked for line officers, as well as for Sergeants and Lieutenants, in instances like St. Louis where Sergeants and Lieutenants spend at least 20% of their time in street level law enforcement work. *See* U.S. DOL, *Nonsupervisory Fire Protection and Law Enforcement Employees in State and Local Government*, Employment Standards Administration (Dec. 1979).

18. *See* H.R. Rep. 331, 99th Cong., 1st Sess. (1985); S. Rep. 159, 99th Cong., 1st Sess. (1985); *Hearings Before the Subcommittee on Labor of the Senate Committee on Labor and Human Resources, Fair Labor Standards Amendments of 1985*, 99th Cong., 1st Sess. (1985).

compensatory time under § 7(o), and incorporated a series of other special provisions for the public sector, including a twelve month compliance period during which public employers were relieved from liability. *Id.*

After its careful consideration of the special needs in the public sector, Congress did not create additional exemptions from the overtime provisions in § 13(a) of the Act. Congress, having been aware of the FLSA provisions and judicial enforcement thereof over the past 45 years, left the exemptions in place, including the Secretary's 1954 salary basis test and its disciplinary docking rule, as fully applicable to employees in the public sector.

C. FLSA Dual Goals of Expanded Work Force and Improved Working Conditions.

This case, by definition, only deals with the situation in which police officers must work in excess of the FLSA law enforcement hours of work standard of up to 171 hours over 28 days. 29 U.S.C. § 207(k). Unless an employee works in excess of that standard, it makes no difference whether he or she is exempt or non-exempt. To the degree employers claim that narrow application of the exemptions would be too costly, they are claiming that those sergeants and lieutenants will be working in excess of the hours of work standard, more than 11 hours per 28 days (or 4 weeks) beyond the 40 hour work week standard generally applicable in this country, more hours than the average police officer worked in 1975 (including overtime hours), more hours than the special upward adjusted standard mandated by Congress. If employers claim significant costs for work beyond the standard, it simply reflects work periods which are too long, added stress, less safety, less sound judgment by those sergeants and lieutenants who are closest to the firing line, and a removal of the intended incentive to hire more street level law enforcement officers.

The Supreme Court "consistently construe[s] the Act 'liberally to apply to the furthest reaches consistent with congressional direction' . . . recognizing that broad coverage is essential to accomplish the goal[s]. . . ." *Tony and Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290, 296 (1985). Exemptions are intended to be rare with the presumption that workers are exempt. *Powell v. United States Cartridge Co.*, 399 U.S. 497, 516 (1950). Perhaps the most serious difficulty with developing a broader exemption rule than has been historically applied, is that the benefit of the hours of work standard to the non-exempt, both in terms of individual officers' safety and employer encouragement to hire more employees, is diminished in proportion to the breadth of the group which is exempt. *See Tony and Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290, 302 (1985) (noting that liberalizing exemptions affect many more people than the workers directly at issue and circumvents the purposes of the Act). The importance of this principle can be best understood by a simple example.

Suppose a 100 officer law enforcement agency has a single chief and two captains who are exempted from the hours of work standard since they are charged with the executive and top internal managerial administrative work, as was intended under the Act. The remaining ninety-seven officers are covered by the hours of work standard. If the department finds that it has insufficient police coverage, the additional work must be performed by those 97% non-exempt employees. Those officers will be paid overtime at time and one-half which generates an economic motive to control overtime, to achieve superior management, to use the special 7(k) and comp time rules developed for law enforcement, (29 U.S.C. § 207(k) and (o)) and, failing all of that, to cause more officers to be hired to insure that sufficient officers are employed to safely do the work that must be done.

Now, suppose the same department, but a more liberal, less narrowly construed set of exemptions applies, all of the six working level lieutenants and the 24 working supervisor sergeants join the chief and two captains in the exempt category. Now, rather than 3% of the department being exempt, over 30% are exempt. When extra work needs to be done, none of the pressures intended under the Act's hours of work scheme come into play. The extra work can be, and will be, assigned to the mid-level lieutenants and sergeants without any additional overtime costs. The department will have no incentive to control the number of hours worked by the sergeants and lieutenants. The sergeants and lieutenants will bear the brunt of the increased stress without compensation for such burdens. The department will have no incentive to hire additional employees if significant additional work is needed. The hours of work standard and the purpose of the FLSA will be successfully avoided in that department.

Protecting Citizen Safety. The 171 hours over 28 day standard further protects the health and safety of Americans — not only the direct health and safety of the law enforcement officers covered by it, but also the safety of the broader society. As explained above, an hours of work standard in law enforcement is important to reducing the stress and pressure placed on working law enforcement officers. Society puts them in the line of fire. They are the nation's centurions. Not only are they entitled to the workplace health and safety protection of limited hours of work, it is also important that law enforcement officers are so protected because society arms them and grants them the power to use force to enforce its laws. The armed centurion on the streets of American cities must be as well rested and protected from stress as the engineers who drive our trains.

Expanding Workforce. The time and one half overtime provisions of the Act, the Congressionally selected method of insuring an hours of work standard, generates a market incentive

for hiring additional employees. This Court has recognized that a main purpose of the overtime provision is to "induc[e] the employer to reduce the hours of work and to employ more men." *Walling v. Youngerman-Reynolds Hardwood Co.*, 325 U.S. 422, 423-24 (1945) (citations omitted). Again, in policing, enforcing the hours of work standard strictly, not only creates jobs for the departments of the *amici* organizations, it also aids in the general goal of increasing the numbers of trained, experienced, unstressed officers combating crime on the streets of our nation.

Compensating For Work Conditions. Overtime pay for excess hours increases the pay of those officers who are required to work long hours under increasing stress — a market society's method of repaying them for the sacrifice to their health and personal life. Congress and the Department of Labor has painstakingly determined the reasonable hours of work standard for law enforcement officers. As demonstrated by the studies cited above, work in excess of that standard places a severe physical and emotional toll on those employees. Congress appropriately has determined that they deserve additional compensation for that toll. *See Walling v. Youngerman-Reynolds Hardwood Co.*, 325 U.S. 422, 424 (1945) (overtime pay serves Congress' purpose of "compensating the employees for the burden of a long workweek.") (citations omitted).

Fostering Cohesive Departments. Uniformity of a standard hours of work rule throughout the work force has a separate virtue of diminishing conflict and strife among employees and avoiding the perception of unfair treatment among workers. *See* The Stein Report, n.25 (1940), J.A. at 31. This goal is particularly important within law enforcement as agencies now move toward team policing. The transition to community or team policing has been inhibited when working supervisors and middle management do not support it. *See* George L. Kelling and William J. Bratton, *Implementing*

Community Policing: The Administrative Problem, U.S. Justice Dept. Perspectives on Policing (July 1993); "Community Policing and the Police Officer," 15 *Perspectives in Policing* 3 (Jan 1993). It will come to fruition only with the cooperation of working supervisors. Such cooperation should not be inhibited by disparate salary treatment. *See* Wiechmann, "Community Policing Exchange," Art. 9, *Officers Select Ideal Supervisors*, (March/April 1996).

Naturally, interdepartmental problems may arise between street officers and their Police Sergeants and Lieutenants as more hours of work are extended beyond the FLSA 171 hour standard. Police sergeants and lieutenants are subject to the same pressures, discipline and control by management as line officers; however, under the Eighth Circuit's rule, they must work beyond the established hours of work standard without the premium pay compensation which their subordinates have. This leads to the subordinate receiving more pay than the supervisor. *See* Trial Transcript, Vol. III (Sgt. Frederick testified subordinates make more than him), *see also*, Vol. IV pp. 25-26, 39, 54, 93. and J.A. at 59 (Chief Sheetz testifying that patrol officers with overtime can make more than their supervising sergeants). Contrary to the Act's intent, the premium pay entitlement of lower ranking officers creates pressure on management to assign all extra work to sergeants and lieutenants who are not entitled to any pay at all for overtime work.

This Court has long recognized that long hours contributes to workplace strife. One solution, according to the Court, is that "Congress may properly use [overtime pay] to lessen the irritations." *Overnight Motor Transportation Company, Inc. v. Missel*, 316 U.S. 572, 576 (1942).

II.

THE SALARY BASIS TEST IS A CRUCIAL COMPONENT TO PRESERVING THE NATIONAL HOURS OF WORK STANDARD FOR LAW ENFORCEMENT OFFICERS.

A. The Salary Basis Test and Its Disciplinary Docking Rules: Reasonable Standards and a Necessary, Objective Test of Exempt Status.

The salary basis test in 29 C.F.R. § 541.118(a) and the public sector salary basis test of 29 C.F.R. § 541.5d are reasonable. They provide a necessary and effective enforcement tool and an objective test of exempt status. *See* Kantor Report (1958), J.A. at 42 (salary test "simplif[ies] enforcement by providing a ready method of screening out the obviously nonexempt employees."); *Balgowan v. New Jersey Department of Transportation*, slip. op. 95-5276, 1996 App. LEXIS 11353 (3d Cir. 1996), *vacated for reh'g pending; Carpenter v. Denver*, 82 F.3d 353 (10th Cir. 1996), *cert. pending; Wisconsin v. Mueller*, 54 F.3d 438 (7th Cir. 1995), *cert. pending* (Case No. 95-586).

Further, the disciplinary docking rule is a tried and true indicator of non-exempt status. Since the 1940's, the Department of Labor has consistently concluded that truly exempt individuals, as they were intended by Congress, are not subject to disciplinary suspensions in pay of less than a pay period. *Compare*, Weiss Report (1949) J.A. at 39 (noting disciplinary deductions of executive, administrative and professional employees were a war time phenomenon and that "[s]uch deductions are rarely made today. The disciplining of such employees in the rare instances where it is needed is usually accomplished in other ways than by deductions from salary.") *with* 57 Fed. Reg. 37666 (1992) (noting public employers can

discipline executive, administrative and professional employees in ways other than through short disciplinary deductions.). *See also*, Petitioners' Brief on the merits for full discussion of salary basis test's history, reasonableness and effectiveness.

B. The "Subject to" Docking Rule in 29 C.F.R. § 541.118(a) As A Practical Matter.

An employee is not salaried if he or she is subject to impermissible disciplinary deductions *as a practical matter.* The real test is not a choice between an unrealistic "merely hypothetical rule" (which the Eighth Circuit rejects) and an extreme "actual deduction rule" (which even the Eighth Circuit does not expressly accept).[19]

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19. *See* Petition for Certiorari, Table A. Since the petition for certiorari in this case was filed, the majority of the circuits rejecting the extreme "actual deduction" rule has grown. *See Yourman v. Dinkins*, slip. op. 95-7561, 1996 U.S.App. LEXIS 12544 (2d Cir. 1996), *cert. pending; Balgowan v. New Jersey Dept. of Transportation*, slip. op. 95-5276, 1996 U.S. App. LEXIS 11353 (3d Cir. 1996), *vacated pending reh'g.; Carpenter v. Denver*, 82 F.3d 353 (10th Cir. 1996), *cert. pending*.

The weight of circuit court decisional law has swung sharply in favor of the stricter rule led by the Ninth Circuit in *Abshire v. County of Kern*, 908 F.2d 483 (9th Cir. 1990), *cert. denied*, 498 U.S. 1068 (1991) and the Third Circuit's *Balgowan v. New Jersey Dept. of Transportation*, slip. op. 95-5276, 1996 U.S. App. LEXIS 11353 (3d Cir. 1996), *vacated pending reh'g.* The Sixth Circuit also favors the majority holding explaining that when it is ambiguous whether an employee is "subject to" deductions, an actual deduction resolves the ambiguity. *Michigan Ass'n of Government Employees v. Dept. of Corrections*, 992 F.2d 82 (6th Cir. 1993).

The extreme "actual deduction" rule is now supported by a shrinking minority comprised of only the Eighth Circuit in this case and the Fifth Circuit in *York v. Wichita Falls*, 994 F.2d 236 (5th Cir. 1991). The Eleventh Circuit, which had been viewed as supporting the minority role, *see Atlanta*

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This Court should endorse a practical test of whether the employees over whom exemption is claimed are, in the day-to-day workplace, in a practical way subject to disciplinary suspensions of less than a pay period. In this case, everyone — the Chief of Police (J.A. at 60, 62), the Internal Affairs Investigator (J.A. at 85), the employer's 30(b)(6) designees (J.A at 63-64), those directly commanding the petitioners (J.A. at 76), and the petitioners themselves (J.A. at 86) — knew that a real rule, actually enforceable against Sergeants and Lieutenants made petitioners subject to disciplinary deductions for part of a pay period.

The specific language of § 541.118(a) states that an employee is not salaried if he or she works under rules which "subject" the employee's compensation to a suspension without pay for less than a full pay period. The "subject to" test was not intended to cover "merely hypothetical" rules stored on dusty shelves which have no practical impact on the employee, but actual rules which are soundly in place and which everyone covered by the rule knows and complies with lest they be disciplined.

The Sixth Circuit has outlined the practical reasons for the rule —

> We choose to focus on the actual policy, rather than whether the policy has ever been administered for two reasons. First, this approach is more consistent with the regulatory language defining a salaried employee as one who is paid "a

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Professional Firefighters v. Atlanta, 920 F.2d 800 (11th Cir. 1991), now actually holds that even one impermissible deduction demonstrates that all similarly situated employees are "subject to" deductions. *Avery v. Talladego*, 24 F.3d 1337 (11th Cir. 1994).

predetermined amount which is not *subject* to reduction because of variations in the quality or quantity of his work." Also, this approach is more consistent with the general notion of a salaried employee; as the *Abshire* court stated "either pay is fixed and immutable, and not subject to deductions, or it is contingent." Second, focusing on the actual policy is more practical and realistic. Employees subject to reduction in pay will, of course, attempt to avoid these deductions by juggling schedules and sacrificing non-work opportunities. Simply because a reduction in pay has never been applied does not mean that the employee has not been affected by the policy subjecting the employee to pay reduction.

Michigan Ass'n of Government Employees v. Michigan Dep't of Corrections, 992 F.2d 82, 86 (6th Cir. 1993).

The Sixth Circuit's logic is particularly appropriate to a police department where a disciplinary code is an important part of the para-military structure.

Entitling only those employees who actually suffer disciplinary deductions to overtime pay, while keeping it from those "subject to" an employer's intentional, well known, unrepudiated discipline code, but not deserving of discipline, would have the odd consequence of granting overtime pay protection only to those who engage in conduct for which they may be disciplined while keeping overtime pay protection from those who comply with the employer's rules and regulations.

C. The "Window of Correction" and Voluntary Employer Compliance.

True national implementation of the FLSA hours of work standard depends on broad voluntary employer compliance. The FLSA "window of correction" under 29 C.F.R. § 541.118(a)(6) should be open only when the employer has proven that any violations of the salary basis test were mistakes, that all deductions were reimbursed as soon as the employer discovered the mistakes, *and* that all of the rules, policies and practices pertaining to impermissible deductions have been changed.

If the "window of correction" opened more widely, as the Eighth Circuit below would open it, an incongruous situation would result. Employers could impose impermissible disciplinary deductions knowing that if challenged, they would avoid liability both retroactively and prospectively by simply promising to reimburse the employee, once finally ordered to do so by the courts, and promising to change the limited rules under which that employee was disciplined. Under the Eighth Circuit's rule, there would be no incentive for employers to abide by the rule and the FLSA's hours of work standard would be effectively and universally defeated.

CONCLUSION

For the foregoing reasons, the *amici*, the Grand Lodge of the Fraternal Order of Police, the International Union of Police Associations, AFL-CIO and their affiliates respectfully request that this Court reverse the decision of the Eighth Circuit.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1995

FRANCIS BERNARD AUER, *et al.*,
Petitioners,
v.
DAVID A. ROBBINS, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR NON-UNION EMPLOYEES IN THE PRIVATE & PUBLIC SECTORS AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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38pp

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iv

STATEMENT REGARDING CONSENT .. 1

INTEREST OF THE AMICUS CURIAE ... 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 7

I. A PERSPECTIVE ON THE SALARY BASIS TEST 7

A. The Salary Basis Test Benefits Employers; Is A Key Objective Indicator Of The Employment Relationship; Protects Employees From Arbitrary Designation & Oppressive Work Hours; Provides Exempt Employees With A Benefit In Exchange For Loss Of Wages 7

1. *The salary basis test benefits employers* 7

2. *The salary basis test is a key objective indicator* 7

3. *The salary basis test protects employees* 9

4. *The salary basis test is something of value for the employee who is not entitled to overtime wages* 10

B. The Salary Basis Test Should Apply In The Public Sector Because The Political Process Functioned As It Was Designed To Function 10

C. "Subject to" Versus Actual: The Better Rule Is That An Express Policy Of Docking Pay For Reasons Prohibited By The Regulations Means Those Subjected To The Policy Are Not True Executives 16

II. ANALYSIS OF THE "WINDOW OF CORRECTION" 20

A. The Window of Correction Should Be Read Conjunctively 20

1. *The plain meaning of "or" includes a conjunctive interpretation* 22

2. *Disjunctive interpretation violates three tenets of statutory construction: interpretation rendering one part void or insignificant must be avoided; interpretation should not thwart legislative purpose; interpretation should not destroy the act* 23

3. *Disjunctive interpretation renders the regulation invalid* 24

4. *Disjunctive interpretation eviscerates the compensation and deterrence objectives of the FLSA, and effectively leaves employees without a remedy* 26

B. Employer Must Comply With All Requirements Imposed By The Window 27

CONCLUSION 28

CASES:

Abshire v. County of Kern, 908 F.2d 483 (9th Cir. 1990), cert. denied, 498 U.S. 1068 (1991) 17, 22
Atlanta Professional Firefighters v. City of Atlanta, 920 F.2d 800 (11th Cir. 1991). 18
Auer v. Robbins, 65 F.3d 702 (8th Cir. 1995) . . . . . *Passim*
Avery v. City of Talladega, 24 F.3d 1337 (11th Cir. 1994) 13, 19
Balgowan v. New Jersey, 84 F.3d 656 (3rd Cir. 1996) 17, 21
Bankston v. State of Illinois, 60 F.3d 1249 (7th Cir. 1995) 17
Barner v. City of Novato, 17 F.3d 1256 (9th Cir. 1994) 17
Brock v. Claridge Hotel and Casino, 846 F.2d 180 (3rd Cir. 1988), cert denied, 488 U.S. 925 8
Carpenter v. City and County of Denver, 82 F.3d 353 (10th Cir. 1996) 17
Chevron v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) 14
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Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971) 14
Commissioner of Internal Revenue v. Keystone Consolidated, 113 S.Ct. 2006 (1993) 11

Craig v. Far West Engineering Co., 265 U.S. 251 (9th Cir.), cert. denied, 361 U.S. 816 (1959) 8
Crandon v. U.S., 494 U.S. 152 (1990) 24
DeSylva v. Ballentine, 351 U.S. 570 (1956) 22
Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985) 12
Gonzalez v. McNary, 980 F.2d 1418 (11th Cir. 1993) 23
Green v. Bock Laundry Machine Co., 490 U.S. 504 (1989) 24
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Hurley v. State of Oregon, 27 F.3d 392 (9th Cir. 1994) 17
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Klein v. Rush-Presbyterian-St. Luke's, 990 F.2d 279 (7th Cir. 1993) 17, 22
Lee v. Flightsafety Services, Corp., 20 F.3d 428 (11th Cir. 1994) . . . . . *Passim*
Lindahl v. OPM, 470 U.S. 768 (1985) 11
Local 2203 v. West Adams County, 877 F.2d 814 (10th Cir. 1989) 12

Lynn's Food Stores, Inc. v. U.S.,
679 F.2d 1350 (11th Cir. 1982) 9
Martin v. Malcolm Pirnie, Inc.,
949 F.2d 611 (2nd Cir. 1991),
cert. denied, 113 S.Ct. 298 (1992) ... 17, 21
McDonnell v. Omaha, 999 F.2d 293
(8th Cir. 1993), cert. denied,
114 S.Ct. 1188 (1994) 18
McKennon v. Nashville Banner Publishing Co.,
115 S.Ct. 879 (1995) 26
McLaughlin v. Richland Shoe,
486 U.S. 128 (1988) 25, 27
Michigan Ass'n of Government Employees v. Michigan, 992 F.2d 82
(6th Cir. 1993) 18
Mitchell v. Lubin, McGaughy & Associates,
358 U.S. 207 (1959) 9
Moreau v. Klevenhagen,
113 S.Ct. 1905 (1993) 7, 13
Motor Vehicle Mfrs. Ass'n v. State Farm Mutual, 463 U.S. 29 (1983) 26
New York v. U.S.,
112 S.Ct. 2408 (1992) 10
O'Neal v. Barrow County,
980 F2d 674 (11th Cir. 1993). 28
Public Employees Retirement System of Ohio v. Betts,
492 U.S. 158 (1989) 24
Qualitex Co. v. Jacobson Products Co., Inc.,
115 S.Ct. 1300 (1995) 11

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114 S.Ct. 655 (1994) 23
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cert. denied, 116 S.Ct. 774 (1996) 14
Shalala v. Guernsey Memorial Hospital,
115 S.Ct. 1232 (1995) 8
Shockley v. City of Newport News,
997 F.2d 18 (4th Cir. 1993) 17
South Carolina v. Baker,
485 U.S. 506 (1988) 12
Teamsters v. U.S.,
431 U.S. 324 (1977) 15
Texas & Pacific R. Co. v. Abilene Cotton Oil Co.,
204 U.S. 426 (1907) 24
Thomas v. County of Fairfax,
758 F.Supp. 353 (E.D. Va. 1991) 8
U.S. v. Campos-Serrano,
404 U.S. 293 (1971) 24
U.S. v. Fleet Factors, 901 F.2d 1550
(11th Cir. 1990) 22
U.S. v. Moore, 613 F.2d 1029
(D.C. Cir. 1979) 22
U.S. v. Riverside Bayview Homes, Inc.,
474 U.S. 121 (1985) 11
Walling v. Yeakley, 140 F.2d 830
(10th Cir. 1944) 8
York v. City of Wichita Falls,
944 F.2d 236 (5th Cir. 1991) 18
Yourman v. Dinkins, 84 F.3d 655
(2nd Cir. 1996) 17

STATUTES:

5 U.S.C. § 706 (2)(A) 26
5 U.S.C. § 706 (2)(C) 26
29 U.S.C. § 202 (a) 9
29 U.S.C. § 213 (a)(1) 8, 10, 14
29 U.S.C. § 255 (a) 25
29 U.S.C. § 259 (a) 25
29 U.S.C. § 260 25

CODE OF FEDERAL REGULATIONS:

29 C.F.R. § 541.1 24
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29 C.F.R. § 541.3 24
29 C.F.R. § 541.5d 12, 13, 14
29 C.F.R. § 541.118 24
29 C.F.R. § 541.118(a) 16
29 C.F.R. § 541.118(a)(6) 20, 24
29 C.F.R. § Part 553 11
29 C.F.R. § 578.3 . . . . . 25, 27
29 C.F.R. § 578.4 25

FEDERAL REGISTER:

57 Fed.Reg. 37,666 (August 1992) 12, 14

LEGISLATIVE HISTORY:

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1st Sess. 7-10, *reprinted in*,
1985 U.S.C.C.A.N. 651, 655-658 12
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1985 U.S.C.C.A.N. 651, 662, 667 15

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99:5257 (December 24, 1991) 21

In The

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OCTOBER TERM, 1995

No. 95-897

FRANCIS BERNARD AUER, ET AL.,
PETITIONERS

v.

DONALD A. ROBBINS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

STATEMENT REGARDING CONSENT

Michael T. Leibig, counsel for petitioners, and John B. Renick, counsel for respondents, have given their consent to the filing of this *amicus curiae* brief. Their letters of consent accompany this brief.

INTEREST OF THE *AMICUS CURIAE*

This *amicus curiae* brief is submitted by members of the Florida Bar who litigate Fair Labor Standards Act cases. It represents the interests of employees in both the private and public sectors who are not members of unions, and employees in the public sector who are not employed in public safety.

SUMMARY OF THE ARGUMENT

It is important to place the salary basis test regulation in proper perspective. The salary basis test benefits employers because compliance with its provisions means the employer does not have to pay extra wages for overtime hours worked.

It is a key objective test used by the Department of Labor to evaluate the employment relationship to determine whether purported "executives, administrators and professionals", are truly employed in that capacity.

It helps protect employees from being arbitrarily and inappropriately designated as exempt executives. An employer is not likely to accord executive and professional status with its attendant latitude in time management and exemption from punishment for minor work rule violations, unless the employee is truly an executive or professional.

It also gives the employee designated by his or her employer as exempt, a benefit in exchange for loss of eligibility for overtime wages. Moreover, in keeping with the goals of the FLSA, it helps protect the employee against unrelieved extensive work hours. The true executive must be given latitude in the use of work time and thus may partially offset a long work day with a partial day absence later.

The salary basis test applies in the public sector. Its provisions had been in place for decades prior to the 1974 and 1985 amendments to the FLSA and are therefore considered incorporated into the statutory text. Furthermore, public sector employ-

ers were actively involved in the 1985 amendments and were able to obtain special exemptions from Congress, yet the salary basis test remained intact. The public sector availed itself of the political process, it worked as designed, and the public sector was not given an exemption from the salary basis test.

The regulation requires that employees designated as exempt executives and professionals by their employer, be paid a guaranteed salary which is not subject to reduction based upon quality or quantity of work performed. Its plain language does not require actual deductions before the executive exemption is jeopardized, only that the employee's pay be *subject* to reduction.

Every circuit court of appeals to have addressed the issue acknowledges that under the regulation, an executive employee may not be *subjected* to docking for prohibited reasons. The majority have held that the existence of an express written policy authorizing docking for impermissible reasons, is sufficient evidence to prove affected employees were subjected to docking. This is the better reasoned approach.

Since the regulation expressly forbids having such a policy for salaried executives and professionals, the existence of such a policy serves no legitimate purpose -- it simply has no place in the employment relationship. Indeed, its existence could have no other purpose than to threaten -- *subject* -- purported executives with loss of pay for reasons not permitted by the regulations. The majority view also properly focuses attention on the

terms and conditions of the employment relationship, rather than on whether (and how many) executives ever broke minor work rules.

The minority and most restrictive view, is that evidence of actual docking must be shown in order to prove affected employees were subjected to an impermissible policy. Even where this view governs however, it takes only a single instance of actual docking made pursuant to policy, to prove all similarly situated employees were *subjected* to docking under the policy.

Even in the minority view, the test is only whether the employer ever actually implemented its impermissible policy. The test is not how many "rule-breaking" employees the employer has had.

Otherwise, "executives'" eligibility for overtime wages would turn on whether they actually violated minor work rules, rather than on whether they were employed in a bona fide executive or professional capacity, as required by statute.

Of course, since the burden of proving entitlement to the exemption is at all times on the employer, it is the employer that must prove it never subjected its purported executive and professional employees to pay-docking for prohibited reasons. Accordingly, the employer must prove it neither had a written policy pursuant to which the executive class could be docked, nor an incident of actual docking inflicted on a member of the executive/professional class. At a minimum, the employer must be able to prove it never actually

docked an executive class member for a reason prohibited under the regulations.

With respect to the window of correction, it is there to avoid the harsh results that might otherwise be imposed on an employer that innocently and carelessly may have had an isolated incident of docking where no policy existed to do so.

It should be read conjunctively so the employer must prove that the docking was both inadvertent and for a reason other than lack of work. Even though the word "or" may have been used, to read it disjunctively would render the word "inadvertent" meaningless and irrelevant because it would always be consumed by, "*all* reasons" (except lack of work).

Indeed, a disjunctive reading would render the regulation invalid. By effectively writing "inadvertent" out of the regulation, the regulation would then clash with the language and purpose of the FLSA. It would actually allow employers violating the FLSA "advertently" (willfully, with knowledge it is prohibited), as well those without a good faith reasonable basis for their conduct, to escape all liability after they are sued for what may have been years of violations.

Moreover, since a lawsuit would expose the employer to no adverse consequences whatsoever, there would be no incentive at all for employers to comply. And, since employees would always lose a lawsuit even where they could conclusively prove the employer violated the FLSA, it effectively strips employees of any remedy. Such absurd results

would eviscerate the compensation and deterrence objectives of the FLSA.

A conjunctive reading makes more sense. It is faithful to the statute and regulations as a whole. It is an interpretation endorsed by the DOL itself, and an interpretation embraced by the vast majority of circuit courts of appeals that have addressed the issue.

In those narrow circumstances where an employer may be eligible for the window of correction, it must truly make a correction. It must repay all monies docked, and must promise future compliance with all wage and hour provisions of the FLSA and its regulations. To require anything less would be to force employees to bring piecemeal litigation to force correction of each and every impermissible rule, one at a time.

Indeed, if an employer does *not* correct all its regulation-violating rules promptly after it is sued or promptly after its error is brought to its attention, its violation is willful and outside the scope of the window of correction altogether.

ARGUMENT

I. A PERSPECTIVE ON THE SALARY BASIS TEST

A. The Salary Basis Test Benefits Employers; Is A Key Objective Indicator Of The Employment Relationship; Protects Employees From Arbitrary Designation & Oppressive Work Hours; Provides Exempt Employees With A Benefit In Exchange For Loss Of Wages

1. *The salary basis test benefits employers.* If the employer complies with all requirements of the test, it may designate certain of its employees as bona fide executives or professionals who are exempt from the otherwise mandatory overtime requirements of the FLSA. It may then legitimately exempt qualifying employees from receiving extra pay regardless of the number of overtime hours the employee works.

Since it benefits employers to be exempt from paying otherwise mandatory overtime wages, employers must comply with all conditions imposed for use of that benefit, or lose eligibility for it. *Moreau v. Klevenhagen*, 113 S.Ct. 1905, 1912 n. 16 (1993).

2. *The salary basis test is a key objective indicator.* Using the salary basis test, the Department of Labor (DOL), or a court, may objectively assess the terms and conditions of the employment relation-

ship to see if employees alleged to be bona fide exempt executives, are actually employed in that capacity.

This is accomplished by looking to the written rules and regulations governing the relationship, and to payroll records to see if purported executives lost pay for impermissible reasons.

The valuable role played by the salary basis test has been recognized. *See, e.g., Craig v. Far West Engineering Co.*, 265 F.2d 251, 259 (9th Cir. 1959), cert. denied, 361 U.S. 816 (1959) (quoting report of DOL that it is the "best single test of the employer's good faith in characterizing the employment"; court concluding regulation is "sound and apparently the one practical method of 'defining and delimiting'" the statutory terms); *Brock v. Claridge Hotel and Casino*, 846 F.2d 180, 185 (3rd Cir. 1988) (salary basis requirement founded "not on logical necessity, but on empirical study"); *Walling v. Yeakley*, 140 F.2d 830, 832 (10th Cir. 1944) (upholding validity as lawfully delegated and exercised); *Thomas v. County of Fairfax*, 758 F.Supp. 353, 360 (E.D. Va. 1991) (regulation embodies "practical understanding of the term 'bona fide executive'").

In addition, since the salary basis test is a legislative regulation, promulgated pursuant to the broad grant of authority given the DOL in 29 U.S.C. §213(a)(1), it has the force and effect of law. *See Shalala v. Guernsey Memorial Hospital*, 115 S.Ct. 1232, 1239 (1995); *Chrysler v. Brown*, 441 U.S. 281, 295-296 (1979).

3. *The salary basis test protects employees*. The salary basis test protects employees from arbitrary and inappropriate designation as executives, administrators, or professionals exempt from the mandatory overtime provisions of the FLSA. As a practical matter, an employer is simply not likely to designate employees as executives and professionals, guarantee them a salary, promise not to dock their pay for partial day absences, and not to dock their pay for breaking minor work rules, unless they are *truly* employed in an executive, administrative, or professional capacity. Under such circumstances, an employer is also not likely to designate a large percentage of its work force as executives working long hours without additional pay. This restraint is faithful to the goals of the FLSA.

The purpose of the FLSA is the "maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers * * *." 29 U.S.C. § 202(a). It seeks to protect against oppressively long work hours. *Lynn's Food Stores, Inc. v. U.S.*, 679 F.2d 1350, 1352 (11th Cir. 1982); *Mitchell v. Lubin, McGaughy & Associates*, 358 U.S. 207, 211 (1959) (exceptions to FLSA are narrowly construed to further congressional goal of providing broad federal employment protection).

Because she is paid for the job done, and not for the number of hours actually worked, under the salary basis test, an executive must not suffer loss of pay because she did not work a required number of hours in a day. Accordingly, if she works an especially long day, she may relieve the stress of those long hours by arriving late or leaving early

the next day or week without fear of loss of pay. Again, this is faithful to the goals of the FLSA.

4. *Payment on a salary basis compensates employees for loss of entitlement to overtime wages*. When an employer unilaterally decides to designate an employee an executive for purposes of exempting him from overtime wages, the employee loses something of value. With the requirement he be paid on a salary basis, the executive gets something of value in return for the loss. He gains freedom and discretion in use of his work time, and freedom from being subjected to loss of pay for minor rule infractions and partial day absences.

Otherwise, the employer could strip the employee of entitlement to extra wages and in exchange give her only more work, an unlimited number of extra work hours, and more responsibility. This would encourage abuse and conflict with the remedial and humanitarian purposes of the FLSA.

B. The Salary Basis Test Should Apply In The Public Sector Because The Political Process Functioned As It Was Designed To Function

The FLSA is a law of general applicability to both the public and private sectors. *New York v. U.S.*, 112 S.Ct. 2408, 2420 (1992). The salary basis test should apply to both sectors as well.

First, for decades, the salary basis test has been a part of the regulations defining the statutory terms "executive, administrative, and professional" set forth in 29 U.S.C. §213(a)(1). When Congress

amended the FLSA in 1974, and again in 1985 to include the public sector in its entirety, Congress and the DOL enacted special provisions applicable only to the public sector. *See, e.g.*, 29 U.S.C. §207(k) (special calculation), §207(o) (compensatory time); and 29 C.F.R. Part 553. Yet, the salary basis test remained unchanged.

When an agency's interpretation has been in place for a long period of time and is not changed when Congress subsequently amends the statute, it is presumed Congress knew of its existence and intended that the pre-existing definitions be incorporated into the statutory terms. *See Qualitex Co. v. Jacobson Products Co., Inc.*, 115 S.Ct. 1300, 1308 (1995) (since Congress re-enacted statutory terms "against a legal background in which those terms had come to include [the term] color, [] its statutory revision embraced that understanding"); *Commissioner of Internal Revenue v. Keystone Consolidated*, 113 S.Ct. 2006, 2011 (1993) (where term acquired a settled judicial and administrative interpretation over half a century before Congress enacted the amendment, Congress "presumptively was aware * * * phrase * * * [had been] consistently construed"); *Lindahl v. OPM*, 470 U.S. 768, 782 n. 15 (1985) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change").

Indeed, when Congress does not overrule an agency's interpretation, that is evidence the construction was reasonable. *U.S. v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 137 (1985).

Second, when the FLSA was amended in 1985 following the decision in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), public sector employers were actively involved in fashioning the amendments. *Local 2203 v. West Adams County*, 877 F.2d 814, 821, n. 10 (10th Cir. 1989) ("state and local governments were intensely involved in the proceedings leading to the FLSA amendments"); S.Rep. No. 159, 99th Cong., 1st Sess. 7-10, *reprinted in*, 1985 U.S.C.C.A.N. 651, 655-658. Yet, even after substantial public sector employer involvement, the salary basis test remained part of the regulations.

Third, when the DOL amended the regulation in 1991, codified at 29 C.F.R. §541.5d, to provide a narrow exception for those public sector employers who were prevented from complying with the partial day absence portion of the salary basis test because they had public accountability laws in place, again public sector employers actively lobbied the DOL. 57 Fed.Reg. 37,666, 37,670 (August 1992) (229 governmental entities registered their comments). Yet, all other portions of the salary basis test, including the disciplinary docking rule, remained.

As the Court held in *Garcia*, 469 U.S. 528 (1985), and reiterated in *South Carolina v. Baker*, 485 U.S. 506, 512-513 (1988), and *Gregory v. Ashcroft*, 501 U.S. 452, 464, 477 (1991), the public sector must find its protection from congressional regulation through the national political process.

Public sector employers have certainly availed themselves of the national political process with

respect to the FLSA. Nonetheless, the salary basis test has remained applicable to them (with the narrow exception in 541.5d, applicable prospectively from September 1992). Public sector employers may not have received everything they wanted, but neither did employees in the public sector. The key is the political process worked.

Notably, public sector employers still have a choice. If an employer, public or private, chooses to retain the discretion to reduce the pay of its executives and professionals for violating minor work rules, it may do so, but must be prepared to pay them for the overtime hours they work. *See Avery v. City of Talladega*, 24 F.3d 1337, 1341 (11th Cir. 1994):

> Of course, the City may suspend employees without pay for other types of insubordination or misconduct [other than major safety violations], but the price for doing so is loss of its ability to treat those employees as executive, administrative, or professional employees exempt from overtime pay.

Or, the employer may accord that degree of freedom and latitude to only its highest level of employees. As with any other employer, however, a public sector employer should not be permitted to "have its cake and eat it too", namely treating its "executives" as hourly employees in every way that matters except for payment for overtime hours. *See Moreau v. Klevenhagen*, 113 S.Ct. 1905, 1912 n. 16 (1993) (if public employer does not comply with all conditions for exemption, it must pay

overtime wages just as every other employer must do).

Recently, the entirety of the pre-1991 salary basis test as applied to the public sector was declared invalid *ab initio* partly because, according to the court, the DOL was entitled to little or no *Chevron*, 467 U.S. 837 (1984), deference because it took too long to amend the test (29 C.F.R. 541.5d) for partial day absences in the public sector. *Service Employees Int'l Union, Local 102 v. County of San Diego*, 60 F.3d 1346, 1356-1359 (9th Cir.) (1995), cert. denied, 116 S.Ct. 774 (1996) (*SEIU*).

Because, however, the DOL was given the broadest possible discretion in 29 U.S.C. § 213(a)(1), to define the exemption's terms, "from time to time", the agency's action or inaction was "committed to agency discretion by law", and is thus not reviewable. *See Heckler v. Chaney*, 470 U.S. 821, 830-831 (1985); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971) (agency action not reviewable when statute granting agency discretion is so broad that it provides no law for courts to apply).

In reaching its conclusion that the pre-1991 salary basis test was invalid as applied to the public sector, the *SEIU* court relied almost exclusively on comments made by the DOL in 57 Fed.Reg. 37,666 (August 1992), codifying 541.5d. Those post-hoc statements on congressional intent, however, were merely the DOL's rationalization for changing its long-standing rule on docking for partial day absences. The comments are thus not entitled to

any great weight or deference when the question is one of congressional intent. *See Gustafson v. Alloyd Co., Inc.*, 115 S.Ct. 1061, 1071, 1072 (1995):

> After-the-fact statements by proponents of a broad interpretation are not a reliable indicator of what Congress intended when it passed the law * * *. [I]t is preferable to consult the documents prepared by Congress when deliberating.

Rather, "It is the intent of the Congress that enacted [the section] * * * that controls." *Teamsters v. United States*, 431 U.S. 324, 354 n. 39 (1977).

As cautioned in *Gustafson, id.*, "Material not available to lawmakers is not considered, * * *, to be legislative history". Instead, if resort to congressional intent is warranted with respect to the 1985 amendments to the FLSA, we must review the legislative history from that time.

When we do, we see the record is devoid of any instruction or suggestion from Congress that the DOL was to change the salary basis test in a particular way, or at a particular time, or at all. In contrast, *see* S.Rep. No. 159, 99th Cong., 1st Sess. 14, 19, *reprinted in*, 1985 U.S.C.C.A.N. 651, 662, 667, directing DOL to promulgate regulations by March 15, 1996 on the new "volunteer" language added in the amendments.

The salary basis test, as narrowly amended prospectively from September 1992, is entitled to

deference and should be applied to the public sector.

C. "Subject to" Versus Actual: The Better Reasoned Rule Is That An Express Policy Of Docking Pay For Reasons Prohibited By The Regulations Means Those Subected To The Policy Are Not True "Executives"

The better reasoned rule is that the existence of an express policy under which a class of employees may be docked pay for reasons prohibited by the regulations, renders that class of employees not exempt from the FLSA.

An employer may have an express policy of pay docking, in a number of ways. It may expressly authorize docking in writing. It may actually dock pay. It may do both. When the employer does both, that is certainly the clearest evidence that the affected employees were indeed subjected to such a policy. Conversely, if the employer has neither, that is the clearest evidence employees are not subjected to docking (assuming they are not verbally threatened with docking).

The circuit courts of appeals to have addressed the salary basis test thus far, have all acknowledged that under the plain language of the regulation, 29 C.F.R. §541.118(a), executives and professionals exempt from overtime wages, may not have their predetermined, guaranteed salary *subjected* to reduction based upon quality or quantity of work performed. Notably, the plain meaning of the term "subject to" is: "governed or affected by; * * *

answerable for". Black's Law Dictionary 1278 (5th ed. 1979).

Accordingly, the vast majority have concluded that having an express policy of docking for impermissible reasons, is sufficient evidence that similarly situated employees governed by the policy, were subjected to it.

The most recent decisions reaching this conclusion are: *Bankston v. State of Illinois*, 60 F.3d 1249, 1253 (7th Cir. 1995); *Balgowan v. New Jersey*, 84 F.3d 656, 662, *reh'g granted*, 84 F.3d 667 (3rd Cir. 1996); *Carpenter v. City and County of Denver*, 82 F.3d 353, 359 (10th Cir. 1996); and *Yourman v. Dinkins*, 84 F.3d 655, 656 (2nd Cir. 1996). The Third and Tenth Circuits joined previous decisions in the Seventh and Second Circuits [1], and decisions in the D.C., Fourth, Sixth, and Ninth Circuits.[2]

The majority view makes sense for two reasons. First, simply put, since the regulations do not

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[1] *Martin v. Malcolm Pirnie, Inc.*, 949 F.2d 611, 615 (2nd Cir. 1991), cert. denied, 113 S.Ct. 298 (1992); *Klein v. Rush-Presbyterian-St. Luke's*, 990 F.2d 279, 286 (7th Cir. 1993).

[2] *Kinney v. District of Columbia*, 994 F.2d 6, 11 (D.C. Cir. 1993); *Shockley v. City of Newport News*, 997 F.2d 18, 24-25 (4th Cir. 1993); *Michigan Ass'n of Government Employees v. Michigan*, 992 F.2d 82, 86 (6th Cir. 1993); *Abshire v. County of Kern*, 908 F.2d 483, 487 (9th Cir. 1990), cert. denied, 498 U.S. 1068 (1991); *Hurley v. State of Oregon*, 27 F.3d 392, 395 n.7 (9th Cir. 1994); *Barner v. City of Novato*, 17 F.3d 1256, 1262 (9th Cir. 1994).

permit such a policy with respect to executives exempt from overtime, the existence of such a written policy would serve no legitimate purpose. Its only conceivable purpose would be to *threaten* purported executives with docking for reasons not permitted under the regulations. "Executives" threatened with docking, have no doubt been *subjected* to docking.

Second, employees whose terms and conditions of employment include a written policy under which their pay may be docked at the employer's option, are no less subjected to that policy than those who may actually be docked. *See Michigan Ass'n of Government Employees v. Michigan*, 992 F.2d 82, 86 (6th Cir. 1993) (employees not actually docked are also affected by the policy because they are forced to juggle schedules and forgo opportunities to avoid being docked).

Perhaps the case most often cited for the proposition that evidence of actual docking is necessary to prove employees were subjected to docking is *Atlanta Professional Firefighters Union v. City of Atlanta*, 920 F.2d 800, 805 (11th Cir. 1991). This is a minority view endorsed only in *McDonnell v. Omaha*, 999 F.2d 293, 296 (8th Cir. 1993) ("mere possibility of an improper deduction in pay does not defeat an employee's salaried status"), cert. denied, 114 S.Ct. 1188 (1994); and less clearly in *York v. City of Wichita Falls*, 944 F.2d 236, 242 (5th Cir. 1991) (summary judgment for employees *vacated*; remanded because determination of salaried status required resolution of material fact where no evidence of actual docking was offered,

and affidavits and testimony asserted no such policy existed and no docking ever occurred).

Atlanta Firefighters was later explained, however, in *Avery v. City of Talladega*, 24 F.3d 1337, 1341 (11th Cir. 1994). The law in the Eleventh Circuit is that evidence of an instance of actual docking is at first necessary, but then sufficient, to prove the class of employees was subjected to a policy rendering them non-exempt from overtime wages.

Indeed, since *one* instance of docking occurred for impermissible reasons, the *Avery* court found it unnecessary to even review the circumstances surrounding the second instance of docking: "We hold that the suspension of Lt. Jacks destroyed not only his exempt status but that of the other lieutenants as well", so it was unnecessary to look at the other lieutenant's suspension. *Avery* at 1342.

Accordingly, even if the rule is that evidence of actual docking is necessary to prove the impermissible policy was actually implemented, only a minimal showing should be necessary.

Otherwise, (1) the focus would be on the number of "executives" who broke minor work rules, rather than on the nature of the terms and conditions of the employment relationship, where the focus belongs; and (2) courts would be thrown into a "numbers game", where in some jurisdictions docking one percent or more of the class of employees may be sufficient to show the class was subjected to docking, while in other jurisdictions docking five percent or less would not be sufficient evidence. In

an area of federal law where uniformity in the application of the statute is so important, this result would be unacceptable.

II. ANALYSIS OF THE "WINDOW OF CORRECTION"

A. The Window of Correction Should Be Read Conjunctively So That An Employer Must Prove Its Docking Was Both Inadvertent And For Reasons Other Than Lack of Work

The regulation known as the "window of correction" is set forth in 29 C.F.R. §541.118(a)(6). By its own terms, whether it applies depends upon the "facts in the particular case." Furthermore, the second and fourth sentences are meant merely to compare deductions generally made when reasons are lack of work, to deductions inadvertently made when the reasons are not lack of work:

> Where deductions are generally made when there is no work available, * * *. On the other hand, where a deduction * * * is inadvertent, or is made for reasons other than lack of work, * * *.

The present controversy centers on the use of the word "or" in the regulation. The court in *Auer v. Robbins*, 65 F.3d 702, 711 n. 7 (8th Cir. 1995) agreed with *Lee v. Flightsafety Services, Corp.*, 20 F.3d 428, 433 (11th Cir. 1994) that in all cases the window must be read disjunctively so either circumstance, inadvertence, or all reasons (except lack of work), suffice. Under *Auer-Lee*, the regulatory term "inadvertent" is thus irrelevant and immaterial to a determination of whether an employer is eligible to escape liability through the window of correction.

The *Auer-Lee* holding conflicts with the DOL's interpretation of its own regulation. *See Salary Basis*, Wage & Hour Manual (BNA) 99:5257 (December 24, 1991) where the DOL stated impermissible disciplinary docking which:

> occur[s] on a regular and recurring basis (e.g., because of an employer's policy), [results in loss of exemption for] such employees, including all of those in the "class" or "category" of employees affected by such deductions, * * * and the exemption may be denied in *all* work weeks.

(Emphasis in original)

It also conflicts with five other circuit courts of appeals to have addressed the issue: *Balgowan v. New Jersey*, 84 F.3d 656, 663, *reh'g granted*, 84 F.3d 667 (3rd Cir. 1996), (window "only applies to inadvertent errors * * * [and] [a]ny docking made pursuant to a written policy, * * *, may not be considered 'inadvertent'"); *Kinney v. District of Columbia*, 994 F.2d 6, 11 n. 5 (D.C. Cir. 1993) (dicta) ("regulation * * * merely provides an escape clause for employers who inadvertently make improper deductions"); *Martin v. Malcolm Pirnie*, 949 F.2d 611, 616-617 (2nd Cir. 1991), *cert. denied*, 506 U.S. 905 (1992) (window "allows employer that makes an impermissible, but inadvertent, deduction * * * to correct

the error"); *Klein v. Rush-Presbyterian*, 990 F.2d 279, 287-288 (7th Cir. 1993) ("intentional and impermissible deductions made for reasons other than lack of work do not meet the window's requirements"); *Abshire v. County of Kern*, 908 F.2d 483, 489 (9th Cir. 1990), cert. denied, 498 U.S. 1068 (1991) ("exception is for the employer that makes a one-time improper deduction and then corrects its error").

There are serious defects in *Auer-Lee's* reasoning:

1. *The plain meaning of "or" includes a conjunctive interpretation.* There is precedent for using the words "or" and "and" interchangeably if the context requires. *See, e.g., DeSylva v. Ballentine*, 351 U.S. 570, 573 (1956) ("or" often used carelessly for "and"); *U.S. v. Fleet Factors*, 901 F.2d 1550, 1554 n. 3 (11th Cir. 1990) (construing "and" as "or" because more faithful to statute; use of "and" deemed "careless statutory drafting"); *U.S. v. Moore*, 613 F.2d 1029, 1040 nn. 85, 86 (D.C. Cir. 1979) (collecting cases where "and" substituted for "or").

Indeed, the plain meaning of the word "or" includes a conjunctive interpretation. *See* Black's Law Dictionary 987 (5th ed. 1979), defining "or":

> In some usages, * * * creates a multiple rather than an alternative obligation; [and] where necessary in interpreting an instrument, "or" may be construed to mean "and".

2. *A disjunctive interpretation violates three tenets of statutory construction: an interpretation rendering one part void or insignificant must be avoided; an interpretation should not thwart legislative purpose; an interpretation should not destroy the act.* The *Auer-Lee* holding results in improper judicial rewriting of the regulation because it writes "inadvertent" out of the regulation. It allows a court to excuse even years of willful violations, violations wholly lacking good faith and a reasonable basis, as long as prohibited docking is for any and all reasons (except lack of work). Surely the word "inadvertent" was included in the regulation for a reason. The word surely means more than a useless, redundant substitute for "reasons other than lack of work". It is improper to simply ignore it.

The interpretation violates a basic tenet of statutory construction that courts should refrain from construing a provision in a way that renders another provision meaningless. *See, e.g., Ratzlaf v. U.S.*, 114 S.Ct. 655, 659 (1994); *Gonzalez v. McNary*, 980 F.2d 1418, 1420 (11th Cir. 1993) (courts should construe statute "so that no part of it will be inoperative or superfluous, void or insignificant").

An interpretation must also lead to a rational result and be faithful to the purpose of the statute:

> If an absolutely literal reading of a statutory provision is irreconcilably at war with the clear congressional purpose, a less literal construction must be considered.

U.S. v. Campos-Serrano, 404 U.S. 293, 298 (-1971). *See also Crandon v. U.S.*, 494 U.S. 152, 158 (1990) ("we look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy"); *Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 527-529 (1989) (J. Scalia, concurring) (disavowing literal meaning because led to absurd, irrational result having no support in text of the statute).

The object and purpose of the FLSA would be thwarted for the reasons set forth in discussion 3., below, regarding the invalidity of the regulation if given the meaning advanced in *Auer-Lee*.

It simply makes no sense to construe the regulation to mean the DOL established the elaborate set of rules at 29 C.F.R. §§541.118, 541.1, 541.2 and 541.3, and then in 541.118(a)(6) effectively said, "never mind" because even if eventually caught, all that needs to be done to escape liability without adverse consequence, is to do what should have been done before you were caught. *See Texas & Pacific R. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 446 (1907) ("the act cannot be held to destroy itself.").

3. *A disjunctive interpretation renders the regulation invalid.* Under an ADEA regulation at issue in *Public Employees Retirement System of Ohio v. Betts*, 492 U.S. 158 (1989), the court held a DOL-EEOC interpretative regulation was invalid because it permitted employers to avoid liability based solely upon an objective test, "cost-justification", while ignoring the statute's subjective intent

criteria -- whether employer engaged in "subterfuge", or had an "intent to evade" the statute's requirements.

Similarly, the window of correction is a DOL interpretative regulation which according to *Auer-Lee*, allows an employer to escape liability based solely upon an objective standard, "reasons other than lack of work", while altogether ignoring the employer's subjective intent. Analysis of the employer's subjective intent is a key, and pervasive element of the FLSA.

First, an employer may escape liability only if it pleads and proves its act or omission was in good faith conformity with, and in reliance on, a written ruling or regulation of the DOL. 29 U.S.C. §259(a).

Second, an employer may only avoid liability for liquidated damages if it proves it had a good faith reasonable basis for believing its conduct did not violate the FLSA. 29 U.S.C. §260.

Third, an employer that willfully violates the FLSA is liable for an extension of the limitations period from two years, to three. 29 U.S.C. §255(a).

An employer is in willful violation if it either knew or was in reckless disregard for the matter of whether its conduct was prohibited by the FLSA. *McLaughlin v. Richland Shoe*, 486 U.S. 128, 133 (1988). *See also* 29 C.F.R. §§578.3 and 578.4 (imposing additional penalties for willful violations, and establishing criteria).

Given this statutory background, the *Auer-Lee* version of the window of correction would be invalid under *Betts*, 492 U.S. 158 (1989); under *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual*, 463 U.S. 29, 43 (1983) (agency rule arbitrary and capricious if "relied on factors which Congress had not intended it to consider, [or] entirely failed to consider an important aspect of the problem"); and under the Administrative Procedures Act, 5 U.S.C. §706(2)(A) and (C) (court must hold unlawful, agency action that is arbitrary or capricious, or that conflicts with governing statute).

4. *A disjunctive interpretation eviscerates the compensation and deterrence objectives of the FLSA, and effectively leaves employees without a remedy.*

As the Court acknowledged in *McKennon v. Nashville Banner Publishing Co.*, 115 S.Ct. 879, 884 (1995), the fact that a violation has occurred cannot be disregarded altogether, since statutes such as the FLSA implicate compensation and deterrence objectives which must be vindicated.

Under a disjunctive interpretation bereft of any requirement that the impermissible docking have been made inadvertently, no one would bother to comply, and no one would dare sue.

An employer might just as well merely give each of its employees honorific titles, declare them all exempt from overtime wages, then dock their allegedly predetermined, "guaranteed" salary any number of times, for any number of impermissible reasons, for any number of years, even with full

knowledge such conduct is prohibited. The worst that could happen, is the employer may eventually be sued. Then it merely has to repay wages it should never have docked in the first place, without even any requirement for payment of interest on those wages.

Since employees would always lose (perhaps after years of litigation), and lose regardless of the extent of the employer's violations, there would be no one to sue on their behalf. Effectively, "executive" employees would have rights, but no remedy.

B. The Employer Must Comply With All Requirements Imposed By The Window

In the narrow circumstances where the employer may be permitted to avail itself of the window of correction, it must do so completely and in good faith. The regulation requires the errant employer promise future compliance. This must mean compliance with all aspects of the wage and hour provisions of the FLSA and its regulations. Otherwise, employees would be forced to sue to eradicate each and every impermissible rule, one at a time.

Moreover, given the definition of willful violation set forth in *McLaughlin v. Richland Shoe*, 486 U.S. 128, 133 (1988), and 29 C.F.R. §578.3, if an employer does not correct all its policies as soon as the problem is brought to its attention, this failure should be clear evidence of a willful violation, a violation that is outside the permissible scope of the window of correction altogether.

It is an anomaly in the law to allow a subsequent remedial measure to eliminate previously accrued liability. The least that should be expected from employers in exchange for this rare forgiveness, is total correction and total compliance. After all, implementing regulations of the DOL -- just as exemptions from the FLSA generally -- are narrowly construed against employers. *O'Neal v. Barrow County*, 980 F.2d 674, 676-677 (11th Cir. 1993).

CONCLUSION

For the foregoing reasons, judgment in favor of the employer should be reversed.

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No. 95-897

In The
Supreme Court of the United States

October Term 1996

FRANCIS AUER, ET AL.,

Petitioners,

vs.

DAVID ROBBINS, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

MOTION TO FILE BRIEF
AND
BRIEF AMICUS CURIAE
OF
THE INTERNATIONAL ASSOCIATION OF
CHIEFS OF POLICE, INC.
IN SUPPORT OF
THE RESPONDENTS

(List of Counsel on Inside Front Cover)

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

MOTION OF *AMICUS CURIAE* TO FILE BRIEF 1

BRIEF OF *AMICUS CURIAE* 1

INTEREST OF *AMICUS CURIAE* 3

ARGUMENT 4

I. PRINCIPLES OF FEDERALISM EMBODIED IN THE UNITED STATES CONSTITUTION PRECLUDE THE CONGRESS, ACTING PURSUANT TO THE COMMERCE CLAUSE, FROM ABROGATING STATE AND LOCAL GOVERNMENTAL SOVEREIGNTY. 4

II. THIS COURT SHOULD RE-EXAMINE ITS DECISION IN *GARCIA v. SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY* IN LIGHT OF ITS RECENT DECISIONS IN *SEMINOLE TRIBE OF FLORIDA v. FLORIDA* AND *UNITED STATES v. LOPEZ*. 6

III. CONGRESS MAY NOT EXTEND THE FLSA TO MUNICIPAL OR COUNTY LAW ENFORCEMENT, EVEN IF IT MAY DO SO FOR QUASI-COMMERCIAL AND PROPRIETARY GOVERNMENTAL FUNCTIONS. 8

CONCLUSION 10

TABLE OF AUTHORITIES

Cases **Page**

Adams v. State of Kansas, No. 94-4201-RDG, 1996 U.S. Dist. LEXIS 9462, 3 Wage & Hour Cas. 2d (BNA) 626 (D. Kan. June 24, 1996) 6
Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985) 6, 7, 8
National League of Cities v. Usery, 426 U.S. 833 (1976) 6
Seminole Tribe of Florida v. Florida, 517 U.S. __, 116 S. Ct. 1114, 134 L. Ed. 2d 252 (1996) 4
United States v. Lopez, 514 U.S. __, 115 S. Ct. 1624, 131 L. Ed. 2d 626 (1995) 4, 5

United States Constitution

Amendment X . . . . . *passim*
Amendment XI 6

Statutes

29 U.S. Code at 201 et seq. 6

Periodical

Lee, *The Political Safeguards of Federalism?, Congressional Responses to Supreme Court Decisions on State and Local Liability*, 20 THE URBAN LAWYER (ABA) 301 (1988) 9

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MOTION TO FILE BRIEF AND BRIEF AMICUS CURIAE OF THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, INC. IN SUPPORT OF THE RESPONDENTS.

This brief is filed pursuant to the rules of the United States Supreme Court. Consent to file has been granted by Counsel for the Respondents. An unconditional consent to file has not been received from Counsel for the Petitioners. The letters of Petitioners and Respondents have been filed with the Clerk of this Court, as required by the rules.

The International Association of Chiefs of Police, Inc.

moves this Court for leave to file the attached brief as *amicus curiae*, and declares as follows:

1. *Identity and Interest of Amicus Curiae.* The *amicus curiae* is described as follows:

The International Association of Chiefs of Police, Inc. (IACP), is the largest organization of police executives and line officers in the world, consisting of more than 14,000 members in 72 nations. Through its programs of training, publications, legislative reform, and *amicus curiae* advocacy, it seeks to make the delivery of vital police services more effective, while at the same time protecting the rights of all our citizens.

2. *Desirability of an Amicus Curiae Brief. Amicus* is a professional association representing the interests of law enforcement agencies at the national level.

Because of the relationship with our members, and the composition of our membership and directors, including active law enforcement administrators and counsel at the national level, we are particularly aware of the impact of the ruling of the court below on the management and administration of law enforcement agencies at all levels of government. We respectfully ask this Court to consider this information in reaching its decision in this case.

3. *Reasons for Believing That Existing Briefs May Not Present All Issues.* IACP is an international and national association, and its perspective is broad. Although the parties clearly are represented by capable and diligent counsel, no single party can completely develop all relevant views of such policy issues.

4. *Avoidance of Duplication.* Counsel for *amicus curiae* has reviewed the facts of this case and has conferred with Counsel for Respondents and Petitioners in an effort to avoid unnecessary duplication. It is believed that this brief presents

vital policy issues directly related to law enforcement management and administration that are not otherwise raised by either party.

5. *Consent of Parties or Requests Therefor.* Counsel has requested consent of the parties. The consent of Respondents has been received and filed with the Clerk of this Court. This motion is necessary because the counsel for Petitioners has placed conditions on the scope and content of *amicus'* brief, which *amicus* considers, in effect, a declination of consent by petitioners under the rules, necessitating this motion. Letters of both counsel have been filed with the Clerk of this Court.

For these reasons, the *amicus curiae* requests that it be granted leave to file the attached *amicus curiae* brief.

Respectfully submitted,

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INTEREST OF *AMICUS CURIAE*

See Section on Identity and Interest of *Amicus Curiae, supra.*

ARGUMENT

I.

PRINCIPLES OF FEDERALISM EMBODIED IN THE UNITED STATES CONSTITUTION PRECLUDE THE CONGRESS, ACTING PURSUANT TO THE COMMERCE CLAUSE, FROM ABROGATING STATE AND LOCAL GOVERNMENTAL SOVEREIGNTY.

This case once again raises issues involving the extent of Congressional authority to infringe on traditional areas of local governance. This Court has recently addressed appropriate limitations of Congress' power to legislate pursuant to the Interstate Commerce Clause in two significant cases, *United States v. Lopez*, 514 U.S. ___, 115 S. Ct. 1624, 131 L. Ed. 2d 626 (1995) and *Seminole Tribe of Florida v. Florida*, 517 U.S. ___, 116 S. Ct. 1114, 134 L. Ed. 2d 252 (1996). Both of these cases emphasized that Congress' ability to enact legislation pursuant to the Commerce Clause is not absolute.

In the *Seminole Tribe* case, this Court invalidated provisions of the Indian Gaming Regulatory Act, holding that the Indian Commerce Clause, similar in this regard to the Commerce Clause, could not be read to abrogate the balance of power between state and federal power otherwise guaranteed by the Constitution. Although the Court did not reach the issue of whether the legislation at issue similarly violated the Tenth Amendment (noting in footnote 10 that the issue was not considered at the District or Circuit Court level), the general principles of federalism are the same with respect to the Tenth Amendment.[1] As this Court found in the *Seminole Tribe* case, Congressional Commerce Clause authority cannot be read to abrogate the balance of power between the federal government and the state and its political subdivisions. It is this delicate

[1] In the instant case the defendants raised the constitutional issue before Judge Cahill; see Transcript Vol. V, pp. 168 et seq.

balance of power upon which our system of government depends.

In the *Lopez* case, this Court discussed the general limitations on Congressional authority pursuant to the Commerce Clause. The Court reiterated the limitations of this authority particularly with respect to state and local governments:

> But even these modern-era precedents which have expanded congressional power under the Commerce Clause confirm that this power is subject to outer limits. In *Jones & Laughlin Steel*, the Court warned that the scope of the interstate commerce power 'must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government.' (citations omitted).

Lopez, supra, 115 S. Ct. at 1628-9.

Lopez goes on to consider traditional areas of local governmental sovereignty within which Congress is not free to intrude, including among them "areas such as criminal law enforcement . . .." *Lopez, supra*, 115 S. Ct. at 1632. It would be difficult to conceive of an area of authority more quintessential to local governmental autonomy than the right to set and pay rates and work schedules for police employees paid with local tax dollars.

The instant case deals with the application of the Fair Labor Standards Act, enacted by Congress pursuant to the Commerce Clause, to criminal law enforcement personnel employed by a local governmental entity, the St. Louis Metropolitan Police Department. The principles of federalism, that protect state and local governments from excessive intrusion into their ability to operate their own affairs

recognized in *Seminole Tribe* and *Lopez*, should preclude the federal government from imposing the Fair Labor Standards Act requirements in this instance.[2] To the extent that adherence to these principles requires reversal or modification of this Court's previous decision in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), then that decision should be reconsidered.

II.

THIS COURT SHOULD RE-EXAMINE ITS DECISION IN *GARCIA v. SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY* IN LIGHT OF ITS RECENT DECISIONS IN *SEMINOLE TRIBE OF FLORIDA v. FLORIDA* AND *UNITED STATES v. LOPEZ*

The federal Fair Labor Standards Act (FLSA), 29 U.S. Code § 201 et seq., at issue in this case, was originally enacted in 1938, and amended in 1974 to extend to virtually all public employees of state and local governments. In 1976, this Court concluded that the setting of wages and hours of employment was an integral governmental function protected by principles of federalism embodied in the Tenth Amendment.

This Court held, therefore, that Congress had exceeded its scope of authority under the Commerce Clause when it included county or municipal governments within the scope of the FLSA. *National League of Cities v. Usery*, 426 U.S. 833 (1976). That decision was subsequently reversed by *Garcia v. San Antonio Metropolitan Transit Authority (SAMTA)*, 469 U.S. 528 (1985). In reaching its decision in *SAMTA*, the majority

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[2] *Amicus* notes that at least one federal judge had interpreted this Court's holding in *Seminole Tribe* to require the dismissal of an overtime suit by state correctional officers, finding that the suit violated the Eleventh Amendment. *Adams v. Kansas*, N. 94-4201-RDG, 1996 U.S. Dist. LEXIS 9462, 3 Wage & Hour Cas. 2d (BNA) 626 (D. Kan. June 24, 1996).

abandoned the existing Court precedent, concluding that the prerequisites for governmental immunity under *National League of Cities*, particularly the identification of "traditional governmental functions," was confusing and unworkable. The Court then went on to find that a publicly owned bus enterprise, one that received considerable federal funding, should be subject to the FLSA's overtime provisions.

In abandoning the "traditional governmental functions" standard, however, the *SAMTA* majority failed to adopt any more workable test for determining the outside parameters of Congressional Commerce Clause authority vis-a-vis local and state governments. In fact, the *SAMTA* majority suggested that Congress' ability to regulate under the Commerce Clause was not subject to the limitations of other Constitutional provisions designed to protect against federal overreaching; the majority held that the interpretation of the limitations of Commerce Clause powers should be left up to the Congress to set for itself.

The recent decisions of this Court in *Seminole Tribe* and *Lopez* have abrogated the continued validity of this notion, specifically affirming the principles of federalism initially followed by the Court in *National League of Cities* and cited by the dissent in *SAMTA*, which noted that "by usurping functions traditionally performed by the States, federal overreaching under the Commerce Clause undermines the constitutionally mandated balance of power between the States and the Federal Government, a balance designed to protect our fundamental liberties." 469 U.S. 528, 572 (Powell, et al., dissenting).

In *Lopez* and *Seminole* Tribes, this Court has reaffirmed its commitment to enforcing appropriate limitations on Congress' Commerce Clause authority with respect to state and local governments. Now, this Court has an opportunity to modify or limit the decision in *SAMTA*, to clarify the limitations on the Commerce Clause found in the Tenth Amendment, and to protect the sovereignty of state governments and their political subdivisions.

III.

CONGRESS MAY NOT EXTEND THE FLSA TO MUNICIPAL OR COUNTY LAW ENFORCEMENT, EVEN IF IT MAY DO SO FOR QUASI-COMMERCIAL AND PROPRIETARY GOVERNMENTAL FUNCTIONS.

Although in *SAMTA*, this Court overruled *National League of Cities*, the actual holding of the case was only that the FLSA could constitutionally be applied to a local government-owned transit authority. In reaching this decision, the Court reviewed extensively the history of mass transit as it affected that case, including the history of federal funding received by that entity. That decision left open the issue of whether the Congress could apply the FLSA to *all* public employees.

Assuming, *arguendo*, the continued validity of *SAMTA*, we urge this Court to recognize a determinative difference between a publicly-owned transit authority and a law enforcement agency. There is no function more critical for the preservation of a community than the protection of lives and property. In America, it is the local police and sheriffs who have a statutory and primary duty for law enforcement. The power to serve arrest warrants, to execute search warrants, to confine individuals against their will and to generally enforce the penal codes are all inherent governmental functions which cannot be exercised independent of governmental authority.

Conversely, a transit operation is commercial in nature and can be completely entrusted to private enterprise.[3] In virtually every venue, public and private transportation services co-exist. Most are funded in whole or in part by user fees. In response to rising labor costs, whether federally mandated or otherwise predicated, transit entities, whether public or private, can simply raise their fares to cover these costs.

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[3] The San Antonio Transit Company, the predecessor to SAMTA, was privately owned before 1959. *See* 469 U.S. at 531.

Law enforcement agencies do not have similar economic luxuries. Federally mandated increased labor costs cannot be passed along to the consumer by increasing fees. Any increased costs would of necessity be borne by the citizen taxpayer.[4] The dissimilarities in this regard between public safety agencies and quasi-commercial operations such as a transit authority could not be more profound.[5]

We urge this Court, at a minimum, to recognize the fundamental difference between regulation affecting the delivery of necessary and essential services, such as law enforcement, and those which are proprietary or quasi-commercial in nature such as transit authorities. The application of the *SAMTA* decision should be limited to the latter category of governmental activity.[6]

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[4] The fiscal impact of the FLSA is significant. The Congressional Budget Office estimated initially in 1985 that the local costs of compliance for the first year alone would total between $500 million and $1.5 billion nationally. Lee, *The Political Safeguards of Federalism?, Congressional Responses to Supreme Court Decisions on State and Local Liability*, 20 THE URBAN LAWYER (ABA) 301, 310 (1988).

[5] In addition, the predicate purpose of the overtime provisions of the FLSA (to encourage employers to hire more workers and avoid the payment of premium pay) cannot rationally be applied to law enforcement. Overtime work in law enforcement is normally occasioned by either emergency operations or required appearances in the judicial process. Neither situation can be controlled meaningfully by the employer, nor can either function be performed by a temporary labor pool hired on an as-needed basis. The FLSA's impact on law enforcement is not consistent with its intended nor actual effect on the private sector. It is simply a federal mandate to pay higher overtime wages to the police.

[6] Although the "commercial/proprietary" vs. "traditional governmental" distinction is not always clear, we believe few individuals would suggest that law enforcement agencies perform commercial activities and are unworthy of Tenth Amendment protections.

CONCLUSION

Principles of federalism require that Congressional action be controlled by the Constitution. The Court must not permit the extent of federal authority over state and local governments to be exclusively controlled by Congress' contemporary political and social agenda. In deciding SAMTA, the Court effectively ceded its obligation to determine the extent of Congressional authority under the Commerce Clause back to the legislature. We respectfully urge this Court to re-examine *SAMTA*, to reassert its authority to interpret the Commerce Clause and in this case to conclude that Congress lacks the constitutional power to extend the FLSA to county and municipal law enforcement agencies.

Respectfully submitted,

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

FRANCES BERNARD AUER, *et al.*,
Petitioners,

v.

DAVID A. ROBBINS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

BRIEF OF THE LABOR POLICY ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF THE *AMICUS CURIAE*	1
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	5
ARGUMENT	7
I. DOL'S SALARY BASIS TEST IS AN OUTDATED INTERPRETATION WHICH HAS NO RELEVANCE TO WHETHER AN EMPLOYEE OUGHT TO BE EXEMPT FROM THE FLSA'S OVERTIME REQUIREMENT AS AN EXECUTIVE, ADMINISTRATIVE OR PROFESSIONAL EMPLOYEE	7
A. The Salary Basis Test Is Contained in an Interpretive Bulletin, Not a Regulation, and Is Entitled to No Deference by This Court	7
B. DOL's Salary Basis Test Has Not Been Revised in Over 40 Years, Despite Widespread Changes in the U.S. Economy and Workplace, and Therefore Has No Persuasive Authority Today	9
II. STRICT APPLICATION OF THE SALARY BASIS TEST IN THIS CASE IS CONTRARY TO THE FUNDAMENTAL PURPOSE OF THE FLSA AND WOULD RESULT IN A WINDFALL PAYMENT OF OVERTIME TO OTHERWISE EXEMPT EMPLOYEES	17
III. THE "WINDOW OF CORRECTION" PURPOSEFULLY ENCOURAGES EMPLOYERS TO CORRECT SALARY BASIS ERRORS AND SHOULD BE BROADLY INTERPRETED TO EFFECTUATE THAT INTENT	19
CONCLUSION	20

TABLE OF AUTHORITIES

CASES — Page

Arnold v. Ben Kanowsky, Inc., 361 U.S. 388 (1960) 2
Batterton v. Francis, 432 U.S. 416 (1977) 7
Brooklyn Savings Bank v. ONeil, 324 U.S. 697 (1944) 17
Chevron v. Natural Resources Defense Council, 467 U.S. 837 (1984) 8
Corning Glass Works, Inc. v. Brennan, 417 U.S. 188 (1974) 2, 12
Dalheim v. KDFW-TV, 918 F.2d 1220 (5th Cir. 1990) 11
Freeman v. National Broadcasting Co., Inc., 80 F.3d 78 (2nd Cir. 1996) 8, 12, 17-18
Idaho Sheet Metal Works, Inc. v. Wirtz, 383 U.S. 190 (1966) 2
Martin v. OSHRC, 499 U.S. 144 (1991) 8
Mitchell v. Kentucky Finance Co., 359 U.S. 290 (1959) 2
Mitchell v. Williams, 420 F.2d 67 (8th Cir. 1969) 2
Reich v. Interstate Brands Corp., 57 F.3d 574 (7th Cir. 1995) 11
Reich v. Newspapers of New England, 44 F.3d 1060 (1st Cir. 1995) 8, 12
Sherwood v. Washington Post, 871 F. Supp. 1471 (D.D.C. 1994) 12
Skidmore v. Swift & Co., 323 U.S. 134 (1944) 8, 11
United States v. Nixon, 418 U.S. 683 (1974) 8
Walling v. General Industries Co., 330 U.S. 545 (1947) 2

STATUTES

5 U.S.C. § 553(b) 8
29 U.S.C. § 201 *et seq.* 2
29 U.S.C. § 202(a) 17
29 U.S.C. § 213(a)(1) 2, 4, 9, 10

REGULATIONS

29 C.F.R. § 541 *et seq.* 2, 7, 12, 13
29 C.F.R. § 541.1 4
29 C.F.R. § 541.2 4

TABLE OF AUTHORITIES—Continued

Page

29 C.F.R. § 541.115 13
29 C.F.R. § 541.118 ..... *passim*
29 C.F.R. § 541.302 12

MISCELLANEOUS

3 Fed. Reg. 2518 (1938) 9
5 Fed. Reg. 4077 (1940) 9
14 Fed. Reg. 5573 (1949) 10
19 Fed. Reg. 4406 (1954) 10
50 Fed. Reg. 47696 (1985) 10
Blasi, J.R. & Kruse, D.L., *The New Owners: The Mass Emergence of Employee Ownership in Public Companies and What It Means to American Business* (Harper Business 1993) 15
Council of Economic Advisors, Economic Report of the President (1996) 13, 14
Department of Commerce, Historical Statistics of the United States: Colonial Times to 1970 (1975) 14
Department of Commerce, Statistical Abstract of the United States (1995) 14, 15
Hearings on the Fair Labor Standards Act Before the Subcom. on Workforce Protections of the Comm. on Economic and Educational Opportunities, 104th Cong., 1st Sess. 104-46 (1995) (statement of Dr. Richard W. Beatty) 15

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BRIEF OF THE LABOR POLICY ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

The Labor Policy Association (LPA) respectfully submits this brief as *amicus curiae*.* This brief urges affirmance of the decision below and thus supports the position of the respondent.

INTEREST OF THE *AMICUS CURIAE*

The Labor Policy Association ("LPA") is an organization of the senior human resources officers of nearly 240 of this nation's largest private sector employers, collectively employing more than 11 million

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* Letters of consent from both parties have been filed with the Clerk of the Court.

Americans. Since its founding in 1939, LPA has been concerned exclusively with the development and implementation of laws and public policies relating to employment. LPA's mission is to ensure that the laws and policies affecting human resource practices in the private sector are sound, practical, and responsive to the realities of the modern workplace.

All of LPA's members are employers subject to the Fair Labor Standards Act of 1938 ("FLSA"), 29 U.S.C. § 201 *et seq.* Moreover all LPA member companies employ executive, administrative and/or professional "while collar" employees exempt from the FLSA's overtime provisions pursuant to 29 U.S.C. § 213 (a) (1) and the regulations and interpretive bulletins set forth at 29 C.F.R. Part § 541 *et seq.* As those regulations and interpretations explain, in order to be exempt from the overtime provisions of the FLSA, an employer must prove affirmatively that the employee meets the applicable salary basis and duties requirements. *Corning Glass Works, Inc., v. Brennan*, 417 U.S. 188, 196-197 (1974). This is a heavy burden. The presumption is that all employees are entitled to overtime and that the exemptions are to be narrowly construed against the employer asserting it. *Mitchell v. Kentucky Finance Co.*, 359 U.S. 290, 295 (1959). The application of any exemption is limited to those who "plainly and unmistakenly come within the statute's terms and spirit." *Arnold v. Kanowsky, Inc.*, 361 U.S. 388, 392 (1960); *Idaho Sheet Metal Works, Inc. v. Wirtz*, 383 U.S. 190 (1966); *Walling v. General Industries Co.*, 330 U.S. 545, 548 (1947). Courts generally require that the employer's burden be met by substantial evidence on each and every element. *See Mitchell v. Williams*, 420 F.2d 67, 69 (8th Cir. 1969). Given these circumstances, all

LPA member companies are interested in, and affected by, any interpretations of the DOL's white collar exemption requirements.

LPA member companies seek to comply with DOL's exemption requirements, including the so-called salary basis test of 29 C.F.R. § 541.118. To do so, however, is complicated by the fact that the salary basis test's requirements are outdated, ambiguous and subject to varying interpretations, depending on the court in which an employer might find itself. As this case demonstrates, the liability for even the most trivial violation can be enormous. The fact that a single incident, such as a personnel policy which allegedly permits an improper deduction, could cause an employer's entire exempt workforce to be deemed nonexempt could have a devastating impact on this nation's employers.

Thus, LPA has an interest in, and a familiarity with, the issues and policy concerns presented in this case. Indeed, because of LPA's membership, it is uniquely situated to brief this Court on the importance of the issues beyond the immediate concerns of the parties to the case, particularly the practical implications of any decision of this court on employers.

STATEMENT OF THE CASE

Generally, the Fair Labor Standards Act of 1938 (FLSA) requires employers to pay overtime compensation to employees for hours worked in excess of 40 in a workweek. (Pet. App. 7a). FLSA provides, however, an exemption from the minimum wage and overtime requirement for those employed as "executive, administrative, and professional employees" (the so-called "white collar exemptions") as the terms are "defined and delimited from time to time by regula-

tions of the Secretary." 29 U.S.C. § 213(a)(1). (Pet. App. 7a, 75a).

In order to be exempt, an employee must be paid the requisite salary, on a salary basis and meet one of the proscribed duties tests. *See* 29 C.F.R. § 541.1 and 541.2 (Pet. App. 76a-80a). The salary basis test, as found at 29 C.F.R. § 541.118, applies to both public and private sector employees alike. While special public sector rules have been developed with respect to the docking of pay for absences of less than a day, the salary basis issues here, namely the reduction in pay for disciplinary suspensions and the proper application of the window of correction, are the same for both private and public sector employers. (Pet. App. 80a-101a). The salary basis test is not a regulation, rather it is contained in an interpretive bulletin of the Department of Labor ("DOL"). (Pet. App. 80a).

Under the salary basis test, an employee is not salaried if deductions can be made from salary for variations in the quality or quantity of work performed. (Pet. App. 8a). According to the Eighth Circuit, the mere possibility of an improper deduction does not defeat an employee's salaried status. (Pet. App. 8a). Under the salary basis test, an employee is not paid on a salary basis, and is therefore entitled to overtime compensation, if his salary is subject to reductions in pay for a violation of rules other than safety rules of major significance. (Pet. App. 9a, 82a). Safety rules of major significance include only those relating to the prevention of serious danger to the plant, or other employees, such as rules prohibiting smoking in explosive plants, oil refineries, and coal mines. (Pet. App. 82a).

In 1990, in lieu of a possible termination for violating the city of St. Louis' residency requirement, a sergeant for the St. Louis police department waived his right to a hearing and accepted a two day suspension without pay. (Pet. App. 10a). This discipline was not imposed for violating a major safety rule. (Pet. App. 9a).

The salary basis test also contains a "window of correction" that states that "[t]he effect of making a deduction which is not permitted under these interpretations will depend upon the facts in the particular case." (Pet. App. 9a, 82a). The interpretation also states that if "a deduction not permitted by these interpretations is inadvertent, or is made for reasons other than lack of work, the exemption will not be considered to have been lost if the employer reimburses the employee for such deductions and promises to comply in the future." (Pet. App. 9a, 82a). The deduction from pay, in this instance, occurred for reasons other than lack of work. (Pet. App. 9-10a). The disciplinary action taken against the sergeant was a one time incident that will not reoccur because the employer has since changed its policy to provide that termination is the exclusive remedy for violations of the city's residency requirement. (Pet. App. 10a). The court below determined that the department made a one time deduction and did not make the disciplinary deduction pursuant to an established policy. (*Id.*).

SUMMARY OF ARGUMENT

The salary basis test as found in 29 C.F.R. § 541.118 is an interpretation devised by DOL in the 1940's to assist it in determining whether an employee is exempt from the overtime requirements of

the FLSA by virtue of being an "executive, administrative or professional" employee. While the "salary basis test" may have been a meaningful indication of exemption status at that point in time, it is no longer certain that it has any relevance to the determination of white collar exemption status. As this case aptly demonstrates, the salary basis test is little more than an outdated interpretation which has caused enormous confusion among the courts and employers regarding its meaning and application. Since DOL has abdicated its responsibilities as the agency charged with "defining and delimiting" the exemptions tests, despite assurances since 1985 that it intends to do so, this court should give no deference to the salary basis requirement as presently defined in 29 C.F.R. § 541.118.

Moreover, strict application of the salary basis test as well as Petitioner's attempt to narrow the window of correction to amend any misdeeds is contrary to the fundamental purpose of the FLSA. Instead of protecting those employees who are most in need of protection, the FLSA is being used as a sword by well-off employees to obtain additional concessions from their employers.

ARGUMENT

I. DOL'S SALARY BASIS TEST IS AN OUTDATED INTERPRETATION WHICH HAS NO RELEVANCE TO WHETHER AN EMPLOYEE OUGHT TO BE EXEMPT FROM THE FLSA'S OVERTIME REQUIREMENT AS AN EXECUTIVE, ADMINISTRATIVE OR PROFESSIONAL EMPLOYEE

A. The Salary Basis Test Is Contained in an Interpretive Bulietin, Not a Regulation, and Is Entitled to No Deference by This Court

As Petitioner points out, the salary basis test is not a "substantive regulation" but rather is an "interpretation." (Br. of Pet'r at 3, n.1). This important distinction makes the salary basis test as written and applied suspect particularly in light of DOL's failure to revise the interpretation for over 40 years.

The salary basis test is found at 29 C.F.R. § 541.118, and is clearly marked as being in a section containing "interpretations." Unlike the "Subpart A-General Regulations" at 29 C.F.R. § 541.0-541.52, the "Subpart B-Interpretations" (where the salary basis test is contained) is written in an interpretive rather than a prescriptive manner. The fact that the salary basis test is "interpretive" rather than "legislative" is significant since:

> Legislative, or substantive, regulations are 'issued pursuant to statutory authority and . . . have the force and effect of law.' By way of contrast, a court is not required to give effect to an interpretive regulation. Varying degrees of deference are accorded to administrative interpretations based on such factors as the timing and consistency of the agency's position.

Batterton v. Francis, 432 U.S. 416, 425 n.9 (1977).

Under the Administrative Procedures Act ("APA"), there is a distinction between substantive rules, which may be adopted only after advanced notice and comment, and "interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice" which may be adopted without notice and comment rulemaking. 5 U.S.C. § 553(b).

Regulations have the force of law, *United States v. Nixon*, 418 U.S. 683, 695 (1974), unless they are found to be arbitrary, capricious, or manifestly contrary to the statute. *Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 843-44 (1984). Unlike regulations, however, interpretations are not binding and do not have the force of law. *Freeman v. National Broadcasting Co., Inc.*, 80 F.3d 78, 83 (2nd. Cir. 1996). Interpretations are not promulgated pursuant to the APA and are "not conclusive even in cases in which they directly deal." *Reich v. Newspapers of New England*, 44 F.3d 1060, 1070 (1st Cir. 1995).

According to this Court, interpretive bulletins and informal rulings "provide a practical guide to employers and employees as to how the office representing the public interest in its enforcement will seek to apply it." *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). Thus, although DOL's interpretations are entitled to some weight, they are "not entitled to the same deference as norms that derive from the exercise of . . . delegated lawmaking power." *Martin v. OSHRC*, 499 U.S. 144, 157 (1991).

B. DOL's Salary Basis Test Has Not Been Revised in Over 40 Years, Despite Widespread Changes in the U.S. Economy and Workplace, and Therefore Has No Persuasive Authority Today

Since its passage in 1938, the FLSA has always contained an exemption for executive, administrative or professional employees. 29 U.S.C. § 213(a)(1). Congress delegated defining the exemptions to the Scretary of Labor. *Id.* ("as such terms are defined and delimited from time to time by regulations of the Secretary . . ."). The first regulations which defined executive, administrative and professional employees were promulgated on October 20, 1938. 3 Fed. Reg. 2518 (1938). These regulations did not contain a "salary basis" requirement. It was not until 1940 that the rules were amended for the first time to include the requirement that an employee be "compensated on a salary basis." 5 Fed. Reg. 4077 (1940). In 1949, the salary basis language, in a report to the Wage and Hour Administrator, was reviewed to determine the need for revision or definition of the term "on a salary basis." (Pet'r J.A. at 36). (U.S. Department of Labor, Report and Recommendations on Proposed Revisions of Regulations, Part 541 Defining the Terms "Executive" "Administrative" "Professional" "Local Retailing Capacity" "Outside Salesman" [June, 1949] [The "Weiss Report"]).

According to the Weiss Report, the salary basis language was appropriate because evidence gathered at DOL hearings demonstrated that the established practice in the private sector was that "executive, administrative and professional employees" were paid on a salary basis. According to the Weiss Report:

> The evidence at the hearing showed clearly that bona fide executive, administrative and profes-

> sional employees are almost universally paid on a salary or fee basis. Compensation on a salary basis appears to have been almost universally required as the only method of payment consistent with the status implied by the term "bona fide" executive. Similarly, payment on a salary (or fee) basis is one of the recognized attributes of administrative and professional employment.

Id.

The Section 213 (a)(1) exemption regulations and interpretations were amended in 1949 to reflect the conclusions in the Weiss Report, 14 Fed. Reg. 5573 (1949), and again in 1954. 19 Fed. Reg. 4406 (1954). The salary basis test, as found at 29 C.F.R. § 541.118, has remained virtually unchanged since that time.

Whether the salary basis test is still a valid measure of whether an employee is an "executive" "administrative" or "professional" employee exempt from the FLSA's overtime requirments is unknown. DOL recognized in 1985 that a thorough review of the exemption rules was necessary. In an Advanced Notice of Proposed Rulemaking (ANPR), DOL posed a series of questions on which it hoped to receive public comments regarding "needed changes in the regulations." 50 Fed. Reg. 47696 (1985). The ANPR asked for comments on all aspects of the exemptions, including the salary, salary basis and duties tests. DOL further noted that it had determined that "there is a need for a more comprehenesive review of the regulation" and that it "had decided to broaden the scope of the review to cover all aspects of the regulations." *Id.* Despite DOL's commitment to comprehensively review all aspects of the exemption rules, the DOL has yet to act on its 1985 Advanced Notice of Proposed Rulemaking. Almost eleven

years later, employers are still waiting on the Department of Labor to act on its promise to review and revise the exemption rules to reflect the current workplace.

The rulings, interpretations and opinions of the Administrator (of the Wage and Hour division of DOL) while not controlling "do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). However, "the weight of such judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Id.* While courts often give great weight to DOL's interpretations, they depart from interpretations where their persuasive force is lacking or the law otherwise requires. *Id.*; *Reich v. Interstate Brands Corp.*, 57 F.3d 574, 577 (7th Cir. 1995) ("[W]e give the Secretary's bulletins the respect their reasoning earns them"); *Dalheim v. KDFW-TV*, 918 F.2d 1220, 1228 (5th Cir. 1990) ("the persuasive authority of a given interpretation obtains only so long as 'all those factors which give it power to persuade' persist") (quoting *Skidmore*).

The salary basis test no longer has any power to persuade. It is an interpretation last revised by the Department of Labor over 40 years ago. During the last 40 years there can be no doubt about the dramatic changes that have occurred in both the nature of the U.S. economy in the United States, as well as the workforce itself. *See* discussion *infra*. DOL has failed to keep pace with these changes and instead determinations about exemption status must be made

based on outmoded rules whose very foundation is specious. The fact that the employer bears the burden of proving that an employee falls within the exemption criteria, *Corning Glass Works v. Brennan*, 417 U.S. 188, 196-97 (1974), further exacerbates the problem. No longer should DOL's outdated rules, including the salary basis test, be permitted to determine who is exempt from the overtime requirements.

DOL's failure to revise its interpretations in 29 C.F.R. Part 541, Subpart B has not gone unnoticed by the courts. In a recent case, *Freeman v. National Broadcasting Co. Inc*, 80 F.3d 78 (2d Cir. 1996), the court, in attempting to determine whether a NBC television newswriter/editor, producer and field producer were exempt from the overtime rquirements of the FLSA as professional journalists, focused on DOL's interpretations as found at Subpart B. *Id.* at 84. Specifically, the court in reviewing an interpretation in that subpart (29 C.F.R. § 541.302) found that its "power to persuade" was meager. *Id.* According to the court, since the interpretation (promulgated in 1949) was "non-binding, refers only to the long test and not to the short test, and is out-of-date, we accord it little weight." *Id.* The court was particularly critical of the fact that the journalism interpretations "have not changed in any material respect since 1949, long before the newspaper industry evolved into its current form." *Id.* quoting *Reich v. Newspapers of New England*, 44 F.3d 1060, 1971 (1st Cir. 1995). *See also Sherwood v. Washington Post*, 871 F. Supp. 1471, 1481 (D.D.C. 1994) (Court concluded that the 40 year old DOL interpretations "should be accorded very little weight" because of changed circumstances in the workforce).

Courts have justifiably been critical of DOL's failure to revise the exemption rules to keep pace

with changes that have occurred in the workplace over the last 40 years. Given DOL's abdication of its responsibilities in this area, the salary basis test requirements are entitled to little or no deference by this court. The Department of Labor concedes that it last reviewed the salary basis requirements over 40 years ago. While we do not question the conclusions drawn at that time by the DOL with regard to the salary basis test, there can be no argument that much has changed in the last 40 years. The rules contained in 29 C.F.R. Part 541 serve as a historical reminder to that period of time. They are written for a manufacturing economy where all workers are either "bosses" or factory line assembly workers. The rules explain in great detail concepts such as working foreman, gang leader and straw bosses, 29 C.F.R. § 541.115, antiquated concepts at best, yet fail to take into consideration the dramatic economic changes that have occurred since.

One such change is the move toward an increasingly service-oriented economy rather than a manufacturing and goods producing economy. In 1946, 41% of workers on non-agricultural payrolls worked in goods producing industries (comprised of mining, manufacturing and construction). By 1995, only 21% did. Likewise, in 1946 35% of workers on non-agricultural payrolls worked in the manufacturing industry, by 1995 that number had fallen to 16%. Council of Economic Advisors, Economic Report of the President, Table B-42, (1996). On the other hand, in 1946 45% of all workers on non-agricultural payrolls worked in service producing industries (comprised of transportation and public utilities, trade, finance, insurance, real estate and services); by 1995, 63% did. *Id.* Workers in the service industry

accounted for only 11% of all workers in 1946, by 1995 that number had increased to 28%. *Id.*

Not only has the kind of work employees are engaged in changed dramatically over the past 40 years, the workforce itself has changed as well. One major change is the dramatic increase in the levels of participation by women in the workforce. Women's labor rates almost doubled between 1948 and 1995, rising from 33% to 59%. *Id.* at Table B-35. The Bureau of Labor Statistics estimates that by the year 2005, the rate will increase to 63%. Department of Commerce, Statistical Abstract of the United States, Table 627 (1995). During this same period of time, men's participation in the workforce fell from 87% in 1948 to 75% in 1995, Economic Report of the President, Table B-35 (1996). The Bureau of Labor Statistics projects this rate to remain constant until 2005. Department of Commerce, Statistical Abstract of the United States, Table 627 (1995). In 1948, 28% of the total civilians employed in the United States were female, by 1995 that number had risen to 46%. Council of Economic Advisors, Economic Report of the President, Table 627 (1996).

Another significant change that has occurred in the workforce in the past 40 years is the significant increase in the educational attainment of workers. In 1940, 5.4% of all men and 3.7% of all women had 4 or more years of college education. Department of Commerce, Historical Statistics of the United States, Colonial Times to 1970, 380 (1975). By 1994, 25.1% and 19.6% of all men and women respectively had 4 or more years of college education. Department of Commerce, Statistical Abstract of the United States, Table 239 (1995). The increase in educational attainment can be seen at all levels. In 1970,

36% of the civilian workforce had less than a high school education; by 1991, only 13% of the workforce had attained less than a high school education. *Id.* at Table 629 (1995).

Not only has the workforce and workplace changed dramatically but so too have compensation practices. After World War II, the norm was that employees were compensated on factors wholly unrelated to performance and instead were paid time-based compensation (for example, hourly rates or salaries based on the number of hours worked). *Hearings on the Fair Labor Standards Act Before the Subcomm. on Workforce Protections of the Comm. on Economic and Educational Opportunities*, 104th Cong., 1st Sess. 104-46 (1995) (statement of Dr. Richard W. Beatty). This is no longer the case. The trend in compensation is towards increasing the use of incentives as a means of motivating performance. Incentive pay, pay for performance, employee stock option plans and other such compensation programs are increasingly popular because there is a positive correlation between ownership and performance. *Id.*; Blasi, J.R. & Kruse, D.L. *The New Owners: The Mass Emergence of Employee Ownership in Public Companies and What It Means to American Business*, Harper Business (1993). Given the change in compensation practices and the increased use of incentive programs to motivate performance it is no longer clear that being paid "on a salary basis" is the same mark of white collar status that it was 40 years ago. Salaries are no longer necessarily "fixed," a white collar employee's total compensation may consist of a number of variables—many of which did not even exist 40 years ago.

There can be no argument that the changes in the U.S. economy over the past 40 years have been significant historical developments. Few could have predicted the changes in technology and information which have so dramatically changed "work" as we know it. It is no surprise that as the United States has moved toward a service and service producing economy, and away from a manufacturing and goods producing economy, workers in the workforce are increasingly better educated. There can also be no question about the significant increase of women in the workforce over the past 40 years. In short, the workplace and workforce have been inextricably altered over the past 40 years. How work is accomplished, what kind of work is done, who is doing the work and the skills they bring to it have all changed in the past 40 years. Compensation practices have changed as well. The typical workplace of the 1940's would bear little resemblance to most workplaces today. Yet applying 1940's standards is just what employers must do in order to determine which of their white collar employees are exempt from the overtime requirements. A close look not only at 29 C.F.R. § 541.118 but at all the Part 541 white collar exemption rules, clearly demonstrates that they are dated and give little guidance to employers seeking to comply with the FLSA. Instead, the exemption rules, and in particular the requirement that an employee be paid "on a salary basis," have become traps for the unwary; a moving target whose requirements change depending on the court in which an employer finds itself. When an agency permits its interpretations to become so archaic the interpretations "power to persuade" are meager indeed and they are entitled to no weight by this Court.

II. STRICT APPLICATION OF THE SALARY BASIS TEST IN THIS CASE IS CONTRARY TO THE FUNDAMENTAL PURPOSE OF THE FLSA AND WOULD RESULT IN A WINDFALL PAYMENT OF OVERTIME TO OTHERWISE EXEMPT EMPLOYEES

This case, reduced to its essential elements, involves an otherwise exempt employee who had his pay suspended for a few days, in lieu of being dismissed, because he violated his employer's residency policy. Petitioner argues that if he is successful in this case, his suspension in lieu of dismissal should cause not just himself but all of the employer's otherwise exempt employees to be considered nonexempt employees entitled to overtime since all were "subject to" improper discipline under 29 C.F.R. § 541.118. This "subject to" argument, and the Petitioner's attempt to narrow the employer's use of the "window of correction" to amend any misdeeds, is contrary to the very purpose for which the FLSA was intended.

The FLSA was enacted in 1938 during the Great Depression to address "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers." 29 U.S.C. § 202(a). In short, Congress intended the FLSA "to aid the unprotected, unorganized and lowest paid of the nation's working population; that is those employees who lack sufficient bargaining power to secure for themselves a minimum subsistence wage." *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697, 707 n.18 (1944).

The FLSA is properly considered a "shield to protect unwary workers," but it is certainly not meant to be used as a sword by which well-off employees obtain a "benefit from their employer for which they did not bargain." *See Freeman v. National Broad-*

casting Co., Inc., 80 F.3d 78 (2nd Cir. 1996). To allow the employees in this case to obtain back and future overtime pay under the circumstances presented would contravene the fundamental purpose of the FLSA. Instead of protecting those employees who are most in need of the FLSA's protections, this case does just the opposite. An alleged technical violation of the salary basis test is being used as a means to extract concessions from the employer, namely the payment of additional overtime.

If Petitioner's arguments prevail, then all employers who have written policies that can be misconstrued or which contradict actual practice, but which nevertheless permit for an allegedly improper deduction under the salary basis test, would be liable for back and future overtime pay for all otherwise exempt employees subject to the policy—from accountants to engineers to the CEO. This would be the case even if no actual reductions in pay occur. Even when the employer discovered a policy on the books that it wished to change, under Petitioner's view the employer would be powerless to make amends because the "window of correction" would not be available.

All of this would lead to absurd results. The determination of whether an employee is exempt from the overtime provisions, as Congress clearly intended white collar employees to be, would no longer turn on the employee's job duties or responsibilities, or even how much he or she is paid, but rather on whether an employee's employer has a personnel policy lurking on the books which may be technically inconsistent with payment "on a salary basis."

III. THE "WINDOW OF CORRECTION PURPOSEFULLY ENCOURAGES EMPLOYERS TO CORRECT SALARY BASIS ERRORS AND SHOULD BE BROADLY INTERPRETED TO EFFECTUATE THAT INTENT

The salary basis test permits an employee to retain his or her exemption status even though certain deductions have occurred. The effect of making an impermissible deduction is to be determined based upon the facts in each particular case. 29 C.F.R. § 541.118 (a)(6). The regulation further states:

> [W]here a deduction not permitted by these interpretations is inadvertent, or is made for reasons other than lack of work, the exemption will not be considered to have been lost if the employer reimburses the employee for such deductions and promises to comply in the future. . .

Id.

The employer in this case followed the window of correction, as the court below determined. (Pet. App. 10a). Subsequent to the disciplinary incident the employer changed its policy to provide that the exclusive discipline for a violation of the residency requirement is dismissal. Nevertheless, and despite the clear language of the window of correction, Petitioner argues that correction is only available in cases of "actual mistake or inadvertence." The window of correction, however, expressly states that it is available where a deduction is "inadvertent or is made for reasons other than lack of work." 29 C.F.R. § 541.118 (a)(6) (emphasis added). The interpretation, therefore, plainly permits an employer to use the window of correction so long as the deduction was inadvertent or made for reasons other than lack of work. The Eighth Circuit found specifically in this case that the disciplinary deduction and subsequent correction fit

within the "window of correction's express requirement" that the improper deduction be made "for reasons other than for lack of work." (Pet. App. 10a).

To adopt the Petitioner's interpretation would be to forever close the window of correction. If an employer were to find that it had a personnel policy which subjected employees to improper deductions then, according to Petitioner's interpretation, an employer could not use the window of correction to change the policy because having the policy in the first place precludes the possibility that any deductions occurred because of "actual mistake or inadvertence." This interpretation would place responsible employers in a "catch 22." An improper policy on the books could result in a loss of exemption status for all white collar employees, with the possibility of litigation, back pay liability and double damages for two and possibly three years. The financial consequences could be devastating. This result would occur not because employees were misclassified as exempt because of their duties, or for that matter based on their compensation but rather because of a technical violation of the salary basis requirement. This is exactly the opposite result from what is intended by the window of correction. The window of correction is purposefully broad to encourage employers who find salary basis errors to correct those errors without further repercussions. Any interpretation to the contrary contradicts the plain language of the salary basis test.

CONCLUSION

For the reasons stated herein, LPA respectfully submits that the decision of the Eighth Circuit should be affirmed.

Respectfully submitted,

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FRANCIS BERNARD AUER, *et al.*,

Petitioners,

against

DAVID A. ROBBINS, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF THE NEW YORK CITY TRANSIT AUTHORITY AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

Page

Table of Authorities iii

Statement of Interest 1

ARGUMENT 3

Introduction 3

POINT I

THE SALARY BASIS TEST, AND SPECIFICALLY ITS DISCIPLINARY PROVISIONS, SHOULD NOT BE ENFORCEABLE AGAINST STATE AND LOCAL GOVERNMENT EMPLOYERS 4

The Salary Basis Test and Its Intended Purpose 4

Congress's Intentions in Expanding the FLSA's Coverage to the Public Sector 8

The Bizarre Nature of the Salary Basis Test's Disciplinary Provisions 8

POINT II

IF THE SALARY BASIS TEST AND ITS DISCIPLINARY PROVISIONS ARE PROPERLY APPLICABLE TO STATE AND LOCAL GOVERNMENT EMPLOYERS, THIS COURT SHOULD CONFIRM THAT RARE SALARY DEDUCTIONS (FOR INSTANCE, CERTAIN DISCIPLINARY SUSPENSIONS WITHOUT PAY) THAT MAY BE IMPERMISSIBLE UNDER THE

SALARY BASIS TEST SHOULD NOT RESULT IN THE ACROSS-THE-BOARD LOSS OF EXEMPT STATUS OF OTHERWISE EXEMPT MANAGERS OF STATE AND LOCAL GOVERNMENT EMPLOYERS 17

Conclusion 23

TABLE OF AUTHORITIES

Page

COURT DECISIONS:

ALLTEL Corp. v. F.C.C., 838 F.2d 551 (D.C. Cir. 1988) ... 14

Auer v. Robbins, 65 F.3d 702 (8th Cir. 1995), *cert. granted*, 116 S.Ct. 2545 (1996) (No. 95-897) ..... *passim*

Bolick v. Brevard County Sheriff's Dept., __ F. Supp. __, 1996 WL 490201 (M.D. Fla. Aug. 29, 1996) 16

Bowman v. City of Indianapolis, 927 F. Supp. 309 (S.D. Ind. 1996) 12

Briscoe v. Bank of Kentucky, 36 U.S. 257 (1837) 20

Childers v. City of Eugene, 927 F. Supp. 403 (D. Or. 1996) 10, 12

Freeman v. National Broadcasting Co., 80 F.3d 78 (2d Cir. 1996) 7, 14, 20

Kuchinskas v. Broward County, 840 F. Supp. 1548 (S.D. Fla. 1993) 18, 19

Lilenfeld v. Kiepper, No. 93 Civ. 5691 (S.D.N.Y., filed Aug. 13, 1993) 2, 3

Meringolo v. City of New York, 908 F. Supp. 160 (S.D.N.Y. 1995) 9

Mueller v. Reich, 54 F.3d 438 (7th Cir. 1995), *petition for cert. filed*, 64 U.S.L.W. 3297 (Oct. 10, 1995) (No. 95-586) 5, 12, 19

Mueller v. Thompson, 858 F. Supp. 885 (W. D. Wis. 1994), *rev'd sub nom.* Mueller v. Reich, 54 F.3d 438 (7th Cir. 1995), *petition for cert. filed*, 64 U.S.L.W. 3297 (Oct. 10, 1995) (No. 95-586) 5, 10, 20

Newsday, Inc. v. Long Island Typographical Union, 915 F.2d 840 (2d Cir. 1990), *cert. denied*, 499 U.S. 922 (1991) . 15

Quirk v. Baltimore County, Md., 895 F. Supp. 773 (D. Md. 1995) 12

Service Employees Int'l Union, Local 102 v. County of San Diego, 60 F.3d 1346 (9th Cir. 1995), *cert. denied*, 116 S.Ct. 774 (1996) 15, 16

Yourman v. Dinkins, 826 F.Supp. 736 (S.D.N.Y. 1993), *aff'd*, 84 F.3d 655 (2d Cir. 1996), *petition for cert. filed sub nom.* Giuliani v. Yourman, 65 U.S.L.W. 3110 (July 29, 1996) (No. 96-152) 5, 15

STATUTES:

Fair Labor Standards Act:
29 U.S.C. §§201-219 ..... *passim*
29 U.S.C. § 213(a)(1) ..... *passim*

29 U.S.C. § 251(a)(4) 18

New York Public Authorities Law §§ 1201(1), 1263(1)(a) ... 1

ADMINISTRATIVE MATERIALS:

5 C.F.R. § 551.201-208 7

29 C.F.R. § 541.1(f) 21

29 C.F.R. § 541.2(e) 21

29 C.F.R. § 541.118(a) ..... *passim*

29 C.F.R. § 541.118(a)(2) 11

29 C.F.R. § 541.118(a)(5) ..... *passim*

29 C.F.R. § 541.118(a)(6) 7, 21

29 C.F.R. § 553.11(b) 19

56 Fed.Reg. 45825 (1991) 19

57 Fed.Reg. 37667 (1992) 7

57 Fed.Reg. 37669 (1992) 18

U.S. Dep't of Labor, *Report and Recommendations on Proposed Revisions of Regulations, Part 541* (June 1949) 10

U.S. Dep't of Labor, *Report and Recommendations on Proposed Revisions of Regulations, Part 541* (March 1958) 5

Brief for the United States as Amicus Curiae, *Auer v. Robbins*, No. 95-897 (Supreme Court, May 31, 1996) (LEXIS, Genfed Library, Briefs File) 18

LEGISLATIVE MATERIALS:

S. Rep. No. 93-690, 93rd Cong. 2d Sess. 22 (1974) 8

H.R. Rep. No. 93-913, 93rd Cong. 2d Sess. 27 (1974), *reprinted in* 1974 U.S.C.C.A.N. 2811, 2837 8

Statement of Interest

The New York City Transit Authority ("Transit Authority") submits this brief amicus curiae in support of respondents (David A. Robbins, et al.), who are the Board commissioners of the St. Louis Police Department. The parties have consented to the filing of this brief.[1]

The New York City Transit Authority is a New York State public authority and public benefit corporation created under the New York Public Authorities Law. All of the Transit Authority's board members are appointed by the Governor of the State of New York (Public Authorities Law §§ 1201(1), 1263(1)(a)), and it is not an agency, despite its name, of the City of New York. It runs, within New York City, the country's largest public mass transit system -- subways and bus lines that operate 24 hours a day, every day of the year -- and has over 40,000 employees, some 2,000 of whom are deemed "managerial" by the Transit Authority. As managers, while they may normally be scheduled to work five days per week (including weekends in many instances), seven or eight hours per day, they are expected to work longer if operational problems require. They are paid an annual salary and are not paid overtime, being treated by the Transit Authority as exempt from the overtime provisions of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201-219, because they are, in the Transit Authority's view, within the FLSA's exemption from the Act's overtime pay requirements that is available for "bona fide executive, administrative, or professional" employees (29 U.S.C. § 213(a)(1)). If the Transit Authority could not treat its managers as exempt, it would have to deploy its managers less flexibly to try to limit

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[1]Copies of the parties' letters consenting to the filing of this brief have been filed with the Clerk.

the amount of overtime it would have to pay to already well-paid personnel, thereby tending to harm service; the Transit Authority would certainly have to pay out more money to its managers (who are already well paid in part because they were not expected to receive overtime pay), thereby exacerbating its already difficult financial situation; and, perhaps most importantly, the Transit Authority would risk having its managers become less willing to manage their subordinates in a cost-effective manner as the managers' incentive to try to minimize overtime among their subordinates would be compromised by their own potential eligibility for the kind of overtime they should be controlling.

In 1993, a number of Transit Authority managers commenced an action for FLSA overtime contending that, while their duties and responsibilities (and titles and other perquisites of employment) were entirely managerial, some aspects of some Transit Authority personnel policies conflicted with what is often called the U.S. Department of Labor's "salary basis test" (or "salary test"), set out at 29 C.F.R. § 541.118(a), which "test" suggests that certain deductions from salary may be inconsistent with FLSA overtime pay-exempt status; thus, those managers claim, they are all entitled to FLSA overtime pay, whether or not any of them actually had those salary deductions imposed on them. That action, *Lilenfeld v. Kiepper*, No. 93 Civ. 5691 (S.D.N.Y., filed Aug. 13, 1993), in which there are now 320 managers as plaintiffs, is pending in the United States District Court for the Southern District of New York; no liability determination has yet been made and that Court has recently put the case on its "suspense calendar" pending the outcome of *Auer v. Robbins*, 65 F.3d 702 (8th Cir. 1995), *cert. granted*, 116 S.Ct. 2545 (1996) (No. 95-897) -- that is, this case -- in this Court.

The personnel policies of the Transit Authority at issue in *Lilenfeld* differ from those of the St. Louis Police Department in *Auer* but some of the legal issues are similar, including the question of the applicability to state and local government employers of the "salary test" and specifically the salary test's disciplinary provisions, and the question of those provisions' proper interpretation and effect (if applicable to state and local government employers at all). Because of the enormous importance to the Transit Authority, and to state and local public employers generally, of those legal issues -- going to, for instance, not just the cost of employing and deploying managers but to the ability of such public employers to manage their managers and to have those managers cost-effectively manage their subordinates -- an additional perspective on some of those issues might assist this Court. The Transit Authority will here try to provide such a perspective in support of the respondents.

ARGUMENT

Introduction

In this brief, the Transit Authority will begin by focusing on the following matters, which relate to Point II of the *Auer* petitioners' brief: the intended purpose of the "salary basis test"; Congress's intentions in expanding the coverage of the FLSA to the public sector; and the bizarre nature of the salary basis test's disciplinary provisions and how those provisions are neither rationally explicable nor consistent with Congress's intentions with respect to the FLSA's coverage of state and local government employees. These subjects go to the threshold question of whether the salary basis test's disciplinary provisions should be enforced against state and local government employers at all. We think they should not.

This brief will go on to discuss aspects of the issues raised in Point IV of the petitioners' brief, that is (assuming the disciplinary provisions of the salary basis test are applicable to state and local governments) whether an entire cadre of hundreds of employees whose duties are found to be, or conceded to be, supervisory or managerial (*i.e.*, within the normal understanding of the statutorily exempt categories of "executive" or "administrative" personnel) should nevertheless all lose their exempt status because those supervisors or managers are theoretically "subject to" disciplinary suspensions of a kind that may conflict with some aspects of the salary basis test's disciplinary provisions even if, in fact, such impermissible disciplinary suspensions never occurred or occurred very rarely (in *Auer*, once). On this question, if the Court reaches it, we will urge that the clarified intentions of the Department of Labor ought to be controlling and, since they are consistent with the Eighth Circuit's approach in *Auer*, *Auer* should be affirmed.

I. THE SALARY BASIS TEST, AND SPECIFICALLY ITS DISCIPLINARY PROVISIONS, SHOULD NOT BE ENFORCEABLE AGAINST STATE AND LOCAL GOVERNMENT EMPLOYERS.

The Salary Basis Test and Its Intended Purpose

The salary basis test was prepared by DOL to help private sector employers determine whether their employees were, under the FLSA's section 13(a)(1) (i.e., 29 U.S.C. § 213(a)(1)), "bona fide executive, administrative, or professional" personnel, and thus statutorily exempt from the FLSA's requirements for overtime pay for work beyond 40 hours in a workweek for most employees. The word "test," however, is nowhere found in the provisions at issue (*i.e.*, at 29 C.F.R. §541.118(a)), and tends to obscure the purpose of the provisions (and thus may be misleading as to the deference that should be accorded to them). Shortly after the salary test reached what is basically its current form in 1954, the DOL clearly stated its general intentions for the salary test in language we think appropriate for the particular salary test provisions at issue here. According to the DOL, in language that the petitioner's brief (at 32-33) only partially quotes and apparently misconstrues, the salary test's provisions were to be used as "guides" to "assist" in determining whether (private sector) employees, "in borderline cases" where the employees' "prestige, status, and importance" are otherwise uncertain, should be deemed "executive, administrative, and professional" employees exempted by Congress from the FLSA's overtime requirements. U.S. Dep't of Labor, *Report and Recommendation on Proposed Revision of Regulations, Part 541*, at 2-3 (March 1958).

It should follow, therefore, that where employees do not dispute that they are managerial -- i.e., "executive" or "administrative" -- in terms of their duties and responsibilities,[2] or where the employees, after a trial (as in *Auer*) or otherwise based on a full evidentiary record, are found to be "executive" or "administrative" in terms of their duties and responsibilities, there is no logical need for further "guid[ance]" from the salary basis test.

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[2] For instance, it appears that the public employee plaintiffs in *Yourman v. Dinkins*, 826 F. Supp. 736 (S.D.N.Y. 1983), *aff'd*, 84 F.3d 655 (2d Cir. 1996), *petition for cert. filed sub nom. Giuliani v. Yourman*, 65 U.S.L.W. 3110 (July 29, 1996) (No. 96-152), and in *Mueller v. Thompson*, 858 F. Supp. 885 (W.D. Wis. 1994), *rev'd sub nom. Mueller v.Reich*, 54 F.3d 438 (7th Cir. 1995), *petition for cert. filed*, 64 U.S.L.W. 3297 (Oct. 10, 1995) (No. 95-586), all chose not to challenge their otherwise exempt status as "executive, administrative, or professional" personnel based on their duties and responsibilities.

After all, the terms "executive" or "administrative" are the terms Congress used in the FLSA, and as a matter of dictionary definition and common understanding those terms involve employees' duties and responsibilities (or "prestige, status, and importance") in an employer's organization. Those terms do *not* involve such matters as whether the employees are "subject to," for instance, suspensions without pay for two or four days (while a workweek's suspension is irrelevant) for certain major safety-related infractions (but not other safety-related infractions or the most serious, bankrupting, non-safety infractions). The statutory "executive" and "administrative" exemptions from the FLSA's overtime pay requirements thus do not directly involve the arcane matters (some of which, various types of disciplinary suspensions without pay, are discussed below) that are the heart of the salary basis test. That test, in light of the DOL's historical statement of its basic purpose, presumptively should not be applied even as "guides" for determining executive or administrative status where, as in *Auer*, the relevant employees' duties and responsibilities are no longer "borderline" but have been found to be clearly within the range of "executive" or "administrative" personnel.[3]

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[3] The Department of Labor is not the only agency charged with helping governmental employers decide which employees should be deemed exempt from the FLSA overtime pay requirements, i.e., which employees Congress intended to be included in the statutory classes of "bona fide administrative, executive, or professional" personnel. The FLSA has also become applicable to millions of federal (civilian) employees and the agency charged by Congress with administering the FLSA for most such federal employees, the Office of Personnel Management, has nothing comparable to the DOL's salary basis test and its focus on deductions from salary. Instead, it relies on job levels and responsibilities to determine exempt status (5 C.F.R.

(continued...)

Moreover, even in a "borderline" situation in which the provisions of the salary test were intended to be used as "guides," the provisions neither on their face define "executive" or "administrative" status nor indicate that they should be controlling in determining such status. To the contrary, the provisions twice characterize themselves as mere "interpretations" (29 C.F.R. § 541.118(a)(6)), and do so in the context of explaining that whether or not (in, presumably, only a "borderline" case) a particular deduction from an employee's salary described in those provisions should affect that employee's exempt status "will depend upon the facts in the particular case" *(id.)*. If the salary test's provisions are called "regulations" (as many courts regularly do, and as the *Auer* petitioners do in their brief when they are not giving those provisions the august designation of "rules"), they are at most "interpretative" regulations, and thus entitled to deference only where they are shown to be persuasive reflections of Congressional intent. *See Freeman v. National Broadcasting Co., Inc.*, 80 F.3d 78, 84 (2d Cir. 1996). As discussed below, the salary basis test, and particularly its disciplinary provisions, should not be seen as persuasively reflecting Congressional intent vis-a-vis the public sector.

(...continued)

§ 551.201-208), a fact noted by the DOL at 57 Fed. Reg. 37667 (1992). This divergent approach to interpreting the same statutory exemption language (i.e., 29 U.S.C. § 213(a)(1)) should create, in itself, a doubt about whether the salary test should be given any special deference for state and local governments.

Congress's Intentions in Expanding the FLSA's Coverage to the Public Sector

Petitioners' brief to this Court seems to pass over any direct discussion of what Congress's intentions were in its expanding the FLSA's coverage to state and local governments with respect to the specific question of the kind of public employees that were to be covered. In fact, the relevant Senate and the House of Representatives Reports both repeatedly made those intentions clear. Congress intended the expanded coverage of the FLSA to apply to "non-supervisory" public employees. *See* S. Rep. No. 93-690, 93rd Cong. 2d Sess. 22 (1974); H.R. Rep. No. 93-913, 93rd Cong. 2d Sess. 27 (1974), *reprinted in* 1974 U.S.C.C.A.N. 2811, 2837.

It seems obvious that *if* the provisions of 29 C.F.R. § 541.118(a) -- whether termed parts of a "test," a set of "guides," or a set of "interpretations" -- are read to call for coverage of public employees who (by stipulation or by thoroughly supported judicial findings) are in fact supervisory (or managerial) in their duties and responsibilities, those provisions would conflict with Congress's intent because such supervisory and managerial personnel clearly were *not* intended by Congress to be covered by the expanded FLSA. And it goes almost without saying that there is apparently no evidence that Congress ever intended to impose restrictions on how public sector managers (in police departments or anywhere else) should be disciplined.

The Bizarre Nature of the Salary Basis Test's Disciplinary Provisions

The *Auer* petitioners' brief does not adequately describe the disciplinary provisions of the salary basis test that are at issue.

The inexplicable and bizarre nature of the disciplinary provisions renders them not merely unenforceable generally as irrational but also incapable of reflecting Congress's intentions in expanding the FLSA's coverage to the public sector's non-supervisory employees; the disciplinary provisions should thus not be applicable to public employers.

The salary test's disciplinary provisions allow an employer to suspend otherwise exempt employees without pay "for infractions of safety rules of major significance" -- defined as limited "to include *only* those [infractions] relating to the prevention of serious danger to the plant, or other employees" -- without affecting the employees' otherwise exempt status (29 C.F.R. § 541.118(a)(5), emphasis added). A suspension without pay for any other reason would jeopardize that exempt status, unless it lasts for an entire workweek (as opposed to, say, a five-day suspension that happens to cross over from one workweek to another) or happens to occur during a workweek in which the employee "performs no work" (29 C.F.R. § 541.118(a), last sentence).

To begin with, not only is there a potentially wide variety of judicial views on what would constitute a "safety rule of major significance,"[4] there is no apparent reason to distinguish between major safety infractions endangering "only" the "plant, or other employees" (for which a manager may be suspended for any period of time without pay without risk to exempt status)

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[4] For instance, in *Meringolo v. City of New York*, 908 F. Supp. 160, 169 (S.D.N.Y. 1995), the Court was apparently willing to deem *any* rule violation by a New York City Department of Corrections Captain sufficiently safety-related to be an infraction of a "safety rule of major significance." The Eighth Circuit in *Auer*, 65 F.3d at 710, seemed to disagree.

and safety infractions endangering *the public*, or to distinguish between safety infractions and "major" *non*-safety infractions. Indeed, during World War II and for several years thereafter the version of the DOL salary test then in effect allowed for (private sector) managers to be suspended for non-safety infractions (absenteeism) without losing their exempt status (because that was common practice in the private sector at that time);[5] and -- judging from the numerous FLSA lawsuits involving this matter -- it appears that in the *public* sector, in the decade since the FLSA became applicable to public-sector employees, at least the possibility of suspensions of managers for non-safety infractions is widespread (if, as in *Auer*, very rarely utilized).

Surely, for instance, there is no apparent sense in ignoring the facts that a public sector manager's negligence causing the loss of millions of public dollars or the shutting down of public-sector services, or the local government's bankruptcy, could be catastrophic to the public employer, even if "safety" is not involved directly; nor is there any apparent sense in ignoring the facts that a public sector manager's mistake could endanger the safety of the public but not of a "plant" or fellow employee. *See Childers v. City of Eugene*, 922 F. Supp. 403, 406 (D. Or. 1996). The oddness of the disciplinary provisions, moreover, can only be exacerbated by the fact that while the DOL's salary test limits the ability of employers to suspend their managers without pay for even the most egregious non-safety misconduct (or for misconduct affecting the public's safety although not the safety of the employer's "plant, or other employees"), employers are perfectly free not to pay those same managers for taking a day

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[5] *See* U.S. Dep't of Labor, *Report and Recommendations on Proposed Revisions of Regulations, Part 541*, at 24-26 (June 1949), discussed in *Mueller v. Thompson*, 858 F. Supp. at 894.

off for "personal" reasons (such as, presumably, attending a baseball game, a child's graduation ceremony, or a house closing (29 C.F.R. § 541.118(a)(2)).

In addition, the disciplinary portions of the salary test are bizarre in that suspensions of managers without pay for non-safety infractions (or for non-plant-or-other-employee safety infractions) *are* quite acceptable to the DOL, and will not endanger exempt status, *if* the suspensions are for one full workweek (typically five days, say, Monday through Friday); but such suspensions are somehow *not* acceptable if the five payless days cross from one workweek to another (say, Thursday, Friday, Monday, Tuesday, and Wednesday [or Thursday, Friday, Saturday, Sunday, and Monday][6]), or (normally) if the payless suspension is not for five days in a workweek but for one, two, three, or four days in that workweek. That too makes no sense.

Finally, *non*-safety suspensions (as well as safety-infraction suspensions involving serious risks to the public but not the employer's plant or other employees), even if less than a workweek, are *still* acceptable to DOL to preserve exempt status so long as, during the remainder of the workweek, the otherwise exempt employee *happens* not to come to work, for any reason, so that during that workweek it turns out the employee "performs no work" (29 C.F.R. § 541.118(a), last sentence). Thus, for instance, a manager's four-day non-safety suspension without pay (within one workweek) will not jeopardize exempt status if

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[6] The Transit Authority, which operates its subway and bus lines every day of the year (and 24 hours a day), has numerous managers with normal schedules that call for work on weekends and thus call for "regular days off" on, for instance, Tuesdays and Wednesdays. We assume that the St. Louis Police Department operates in a similar way.

the manager, by chance or otherwise, does not work on the fifth day (because, perhaps, it is a holiday, or because on the fifth day the manager is sick, on vacation, on jury duty, at a baseball game, or for any other reason "performs no work").

It should not be surprising, therefore, that the courts that do address the matter more and more are deciding that the disciplinary provisions of the salary test are inexplicable and bizarre. *See Childers v. City of Eugene*, 922 F. Supp. at 408 n.3 (disciplinary provisions are "puzzling" in that "the DOL in effect encourages more severe pay docking sanctions against exempt employees than the employer might otherwise choose to impose for disciplinary reasons. This 'one week or nothing approach'... [is as] bizarre [as the] limitation of 'major safety rules' to violations endangering co-workers and the plant, [thereby] excluding dangers presented to the public ..."); *Quirk v. Baltimore County, Md.*, 895 F. Supp. 773, 783-784 (D. Md. 1995) (the one week or nothing approach would lead to a "ludicrous result"). Provisions that are so inexplicable should be deemed unenforceable, and disregarded as a regulatory interpretation of the overtime pay exemption provided to "bona fide executive, administrative, or professional" personnel by the FLSA itself at 29 U.S.C. § 213(a)(1).

Moreover, the odd twists and turns of the disciplinary provisions have no rational connection to determining whether employees whose duties in all respects look managerial are in fact "executive" or "administrative." For instance, taking up the Seventh Circuit's apparent invitation in *Mueller v. Reich*, 54 F.3d 438, 443 (7th Cir. 1995), *petition for cert. filed*, 65 U.S.L.W. 3297 (Oct. 10, 1995) (No. 95-586), the District Court in *Bowman v. City of Indianapolis*, 927 F. Supp. 309 (S.D. Ind. 1996), determined that the rationality of the disciplinary provisions' relationship to true "executive" or "administrative"

status is indeed so "'feeble'" as to make those provisions unenforceable:

> In particular, we do not think it is rational to say that because an employee who is otherwise considered an exempt administrative, professional or executive employee might be docked one or two or three days pay, that it necessarily follows that the employee must therefore really be an hourly employee. . . . [I]s a bank vice president, who clearly meets the duties test for an executive employee, and who is paid $100,000 per year, to be considered an hourly employee just because she might be docked a few days pay for swearing at the bank president? The regulation appears to say so but we see no logic in this. . . . [A] $35,000/year executive does not cease to be a $35,000/year executive just because she is suspended for four days for breaking a rule. We do not doubt that it might be rational to look to the length or frequency of disciplinary suspensions without pay as one of several factors in determining the employee's status. However, we do not think it is rational to consider such suspensions as *conclusive* evidence that an employee is hourly. We therefore find that the disciplinary component of the salary test is arbitrary and capricious, and that, in accordance with the Administrative Procedure Act, we must set aside that regulation.

927 F. Supp. at 315 (emphasis in original). This is a critical point because, as indicated above, Congress intended the FLSA, when expanded to cover the public sector, to cover public "non-supervisory" personnel. The disciplinary provisions of the salary basis test are bizarre and that bizarreness makes them not rational, let alone persuasive, guides for determining whether an employee who is otherwise "executive" or "administrative"

should nevertheless be deemed to fit into the category of public employees Congress intended to have the FLSA cover: "non-supervisory" employees.[7] *Cf. Freeman v. National Broadcasting Co., Inc.*, 80 F.3d at 84-85 (DOL interpretations concerning exempt status of journalists lacked power to persuade and should not be followed where they were designed in 1949, had failed to take account of changes since then in the work and circumstances of many journalists, were thus "anachronistic, even irrational," and "would produce a result incongruous with the purposes of [Congress in enacting] the FLSA").

This is not just an abstract matter. The real world consequences of failing to comply with the twists and turns of the disciplinary portion of the salary test regulations could be severe, indeed punishing in the view of the petitioners here and, for instance, in the view of the Second Circuit (and District

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[7] The petitioners' assertion that public employers can meet the disciplinary provisions' requirements without collapsing (albeit with some expense or deleterious side effects) misses the point. Just as would be true of a (hypothetical, 1954-era) provision calling for loss of exempt status of an otherwise "executive" employee if he does not wear a grey flannel suit every day he is in the office, the requirements of the disciplinary provisions -- at least in the public sector -- have *no* rational relationship to an employee's actual duties and responsibilities (or even level of pay), and thus have no significant value (let alone determinative force) in deciding whether well paid executive or administrative employees (in terms of duties) are really non-exempt "non-supervisory" (or "hourly") employees masquerading as managers. A regulated party's being able to take steps to avoid the consequences of irrational regulations cannot save those regulations from being struck down. *Cf. ALLTEL Corp. v. F.C.C.*, 838 F.2d 551, 561 (D.C. Cir. 1988) (an agency "cannot save an irrational rule by tacking on a waiver procedure").

Court) in *Yourman v Dinkins*: loss of exempt status of an *entire* cadre of hundreds of well-paid managers. As a practical matter, the only way for state and local public employers to be *sure* not to run afoul of the salary test's disciplinary provisions -- which are in part imprecise and in part inexplicably bizarre -- is to pay every suspended manager (at least for a full workweek) although he or she might *have to be suspended immediately*, even in the middle of a workweek. For instance, an immediate suspension might be required where the manager appears to have engaged in sexual or racial harassment of other employees, because the employer has a federal statutory obligation to eliminate such harassment from its workplaces (*see Newsday, Inc. v. Long Island Typographical Union*, 915 F.2d 840, 845 (2d Cir. 1990), *cert. denied*, 499 U.S. 922 (1991)); or the manager's misconduct may make it essential that the manager *immediately* lose access to employer records or computers. Paying such a suspended manager would directly violate an aspect of the "public accountability" principle guiding most public payroll systems -- that public employees should not be paid for time they do not work -- and which principle, more and more courts are concluding, Congress did not intend the FLSA (and thus a DOL salary test) to interfere with. *See Service Employees Int'l Union, Local 102 v. County of San Diego*, 60 F.3d 1346, 1352 n.2 (9th Cir. 1995), *cert. denied*, 116 S. Ct. 774 (1996).

A final determination of the enforceability of the disciplinary provisions of the salary test, if it results in the invalidity of those provisions, should render the *entire* salary test invalid. That test was essentially re-written in 1954 as an interrelated whole. For a court to find a part of the test inapplicable but to enforce the remainder would effectively be an exercise of judicial guideline rewriting or "rulemaking," which is, as the Ninth Circuit observed in deeming the entire salary test inapplicable to the public sector based on the invalidity of one portion of it, "a

power with which we are not invested." *Service Employees Int'l Union*, 60 F.3d at 1354.

The historical record shows that Congress did not intend through the FLSA to cover public employees above the "non-supervisory" level, let alone to regulate how state and local governments should discipline their managers.[8] The salary basis test's disciplinary provisions -- which were developed for the private sector (and to mirror evolving private sector practices) and never even the subject of hearings about, let alone revised to take into account, the practices and history of the public sector -- should not be applied to public sector employees and especially those found to be, in their duties and responsibilities, "executive" or "administrative" employees.

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[8] *See Bolick v. Brevard County Sheriff's Dept.*, __ F. Supp. __, 1996 WL 490201, *10-11, *12 n.3 (M.D. Fla. August 29, 1996), in which the court held the "disciplinary component of the salary test to be arbitrary and capricious, and therefore invalid, as applied to [otherwise exempt] law enforcement employees" because the test could not be reasonably applied "for use in determining the appropriate length for a suspension for a law enforcement officer" and observed that it would not be logical to "allow[] the tail to wag the dog ... i.e., to permit the salary [basis test] ... to be a central factor affecting how long a[n] [otherwise exempt] police officer will be disciplined."

II. IF THE SALARY BASIS TEST AND ITS DISCIPLINARY PROVISIONS ARE PROPERLY APPLICABLE TO STATE AND LOCAL GOVERNMENT EMPLOYERS, THIS COURT SHOULD CONFIRM THAT RARE SALARY DEDUCTIONS (FOR INSTANCE, CERTAIN DISCIPLINARY SUSPENSIONS WITHOUT PAY) THAT MAY BE IMPERMISSIBLE UNDER THE SALARY BASIS TEST SHOULD NOT RESULT IN THE ACROSS-THE-BOARD LOSS OF EXEMPT STATUS OF OTHERWISE EXEMPT MANAGERS OF STATE AND LOCAL GOVERNMENT EMPLOYERS.

The petitioners argue that, even though *actual* deductions from the plaintiffs' salaries that could be impermissible under the Eighth Circuit's understanding of the DOL's salary test and in particular its disciplinary provisions -- here disciplinary suspensions without pay of other than whole workweeks for reasons other than a violation of a major safety-of-plant-or-other-employees rule -- might be very rare or non-existent, nevertheless *all* of the hundreds of plaintiffs (even though only one had any such deductions made) should be deemed to have lost their exempt status (for the entire multi-year liability period) because they all were at least *theoretically* "subject to" (29 C.F.R. § 541.118(a)) impermissible salary reductions within what petitioners assert should be the meaning of that language in the salary test. Petitioners therefore assert that the Eighth Circuit erred in concluding to the contrary. If the salary basis test or its disciplinary provisions are held to be applicable to public employers, this Court should affirm the Eighth Circuit's decision because its view is the only one that (i) comports with the intent of the author of the "subject to" language and the salary basis test -- the DOL -- as that intent was clearly expressed by the DOL to this Court, *in this litigation*, and (ii)

comports with Congress's general view that the FLSA should not be a vehicle to create windfalls.

In the United States' May 31, 1996 amicus brief to this Court in this case, the Department of Labor's intended meaning of its own salary test's "subject to" language was made exquisitely clear. Rejecting reliance on theoretical possibilities (or rare examples) of pay deductions inconsistent with the salary test, and looking to the practical realities of actual conduct vis-a-vis a state or local government's managers as a group, the Department stated: "where no deductions have actually been made, or where there have been only isolated instances in which [impermissible] disciplinary suspensions have occurred, or where [impermissible] suspensions have occurred only under unusual circumstances, employees who are not themselves [impermissibly] suspended do not lose their salaried status." Brief for the United States as Amicus Curiae at 7 [informal pagination], *Auer v. Robbins*, No. 95-897 (Supreme Court, May 31, 1996) (LEXIS, Genfed Library, Briefs File). *This* DOL view of its own salary test is obviously consistent with Congress's statement (albeit one made in a different context) that the FLSA should not be interpreted to allow employees to "receive windfall payments" (29 U.S.C. § 251(a)(4)). *See also Kuchinskas v. Broward County*, 840 F. Supp. 1548, 1557 (S.D. Fla. 1993) (it would be "fundamentally unfair and inequitable" to interpret to salary test to call for "the 'granting of windfall awards of across-the-board retroactive overtime payments to public employees who never had any actual [impermissible] deductions made in their salaries, along with employees who rarely had such deductions . . . simply because their salaries were theoretically "subject to" the possibility of" such impermissible deductions) (quoting 57 Fed.Reg. 37669 (1992)).

Moreover, affirmance of *Auer* in this respect would have the important benefit of avoiding supervisory employees' losing the will, or at least some incentive, to supervise efficiently. The principle of "public accountability" (*i.e.*, not merely having government agencies not pay public employees for time they do not work, but also having those agencies be accountable to the taxpayers for the proper expenditure of funds) has been widely recognized by the DOL and the courts (*see*, 56 Fed. Reg. 45825 (1991); *Kuchinskas v. Broward County*, 840 F. Supp. at 1556) as a principle that the FLSA, and thus the salary basis test, should not be construed to interfere with.

"Public accountability," in the broader sense of governments' having the ability to control and so be accountable for their expenditures, depends on having managers who, among other things, direct non-supervisory employees cost-effectively (and minimize those employees' overtime in the process). If large groups of governmental personnel of undisputed managerial responsibility become potentially eligible for FLSA overtime because pay or personnel policies are even theoretically inconsistent in some way with a provision of the salary test -- because managers may be merely theoretically "subject to" a pay deduction that may be (or may turn out to be) impermissible under the salary basis test -- those managers (and thus the public agencies they run) will be put into a situation potentially destructive of local governments' ability to ensure "public accountability" in their operations. Those managers might have a financial stake not in minimizing overtime but in maximizing it, for those they supervise and thus for themselves.

Since such potentially no-longer-exempt managers are already a relatively small percentage of the total number of public sector employees (about 4% in the case of the Transit Authority), and such potentially no-longer-exempt managers ascend up to the

highest levels of state and local government (stopping only at managers who are directly appointed by or supervised by, or who serve as "immediate advisor[s] to," elected officials (*see*, e.g., 29 C.F.R. § 553.11(b)), almost all managers will be placed in a position of being potentially eligible for overtime pay when their responsibilities should call on them to minimize such expenses. (Indeed, among the 320 plaintiffs in the Transit Authority litigation is a former Vice President, the equivalent of an Assistant Commissioner of a city or state agency or department.) In other words, ignoring "public accountability" by applying the salary test to state and local government personnel who are clearly managerial in terms of their duties could not only lead to "a public employee work force with few exempt employees or none at all" (*Mueller v. Thompson*, 858 F. Supp. at 893), but would raise what Justice Story described as that "anxious inquiry": "*quis custodiet custodes*?" (*Briscoe v. Bank of Kentucky*, 36 U.S. 257, 348 (1837)).

The best response to that question -- i.e., who will guard the guardians (of the public's money)? -- is to avoid having to answer it by accepting the DOL's specific expression, made directly to this Court in this case, of its intentions in this area, which intentions are consistent with what almost certainly was Congress's intent. As indicated above, Congress had in mind extending the FLSA to government employees it repeatedly described as "non-supervisory," not in extending the FLSA's overtime pay provisions to any managers, let alone managers en masse. "Congress never intended to require state and local governments to choose between their obligation to remain accountable to the public and their ability to make use of the FLSA's managerial exemption." *Mueller v. Thompson*, 858 F. Supp. at 896.

Moreover, the FLSA was not intended to give well paid personnel with managerial powers and "prestige ... a [further] benefit from their employers for which they did not bargain" (*Freeman v. National Broadcasting Co.*, 80 F.3d at 86), or to create difficulties in managers' properly managing their subordinates and exercising their discretion (29 C.F.R. §§ 541.1(f), 541.2(e)) on behalf of the public employer whose affairs they direct. Accordingly, where the duties of governmental personnel are found to be (or are conceded to be) managerial, Congress's intent, and the ultimate protection of the principle of "public accountability," call for the salary basis test to be interpreted (as the DOL now says it should be interpreted) so that rare "impermissible" pay deductions do not endanger the exempt status of all other managers.

Finally, as to the one employee (or few employees) who actually may have suffered the unusual "impermissible" suspensions, the clarified view of the Department of Labor is that the so-called "window of correction" doctrine (see 29 C.F.R. § 541.118(a)(6)) lets the employer maintain the exempt status of even the impermissibly suspended employee(s) if the employer thereafter modifies its policies or practices to preclude such impermissible suspensions in the future and states that it intends to reimburse the suspended employee(s). Brief for the United States as Amicus Curiae at 10-11 [informal pagination], *Auer v. Robbins*. This view is clearly consistent with the language of the provisions themselves; that language creates such a window of correction where the rare impermissible deduction "is inadvertent, *or* is made for reasons other than lack of work" (29 C.F.R. § 541.118(a)(6), emphasis added). The petitioners' view of this language, which view would limit the window of correction to *only* inadvertent deductions, not only ignores the clearly disjunctive phrase "or ... for reasons other

than lack of work" but is now obviously and directly contrary to the DOL's view of its own salary test.

The differences among the Circuits as to the proper meaning and application of the "subject to" language, and the window of correction provisions, of the salary basis test arise from different courts' varying guesses about what the *DOL* intended. The DOL has now, in a focused and explicit way, made its intentions clear to this Court, in this case. The recent clarification by the Department of Labor of its intended meaning of its salary test thus ought to be controlling as to what the DOL's salary test means. The Department of Labor's intended meaning of its salary test seems to be the one utilized by the Eighth Circuit in *Auer*, and this Court should affirm, especially since that interpretation is consistent with Congress's general view that the FLSA should not be interpreted to provide windfalls and its specific view that the FLSA was intended to cover only "non-supervisory" public employees.

Conclusion

For the reasons outlined above, the judgment of the court of appeals should be affirmed.

October 9, 1996

Respectfully submitted,

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In The

Supreme Court of the United States

October Term, 1995

FRANCIS BERNARD AUER, et al.,
Petitioners,

vs.

DAVID A. ROBBINS, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF AMICUS CURIAE BROWARD COUNTY, FLORIDA IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

PAGE

TABLE OF CITATIONS ii

STATEMENT OF INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 2

THE SALARY BASIS TEST FOR DETERMINING WHICH EMPLOYEES ARE EXEMPT FROM THE FAIR LABOR STANDARDS ACT IS NOT VALID AS APPLIED TO THE PUBLIC SECTOR.

CONCLUSION 13

TABLE OF CITATIONS

CASES **PAGE**

Abshire v. County of Kern,
908 F.2d 483 (9th Cir. 1990) 8, 9, 13

American Meat Institute v. United States Department of Agriculture,
646 F.2d 125 (4th Cir. 1981) 11

Batterton v. Francis,
432 U.S. 416 (1977) 10

Brennan v. Wilson Building, Inc.,
478 F.2d 1090 (5th Cir) cert. denied, 414 U.S. 855 (1973) 3

Building and Construction Trades Department AFL-CIO v. Donovan,
712 F.2d 611 (D.C. Cir. 1983),
cert. denied, 464 U.S. 1069 (1984) 10

Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.,
467 U.S. 837 (1984) 11

Donovan v. Carls Drugs Co., Inc.,
703 F.2d 650 (2d Cir. 1983) 5

Garcia v. San Antonio Metropolitan Transit Authority,
469 U.S. 528 (1985) 6

Hilbert v. District of Columbia,
23 F.3d 429 (D.C. Cir. 1994) 2, 12

Keller v. City of Columbus,
778 F.Supp. 1480 (S.D. Ind. 1991) 4

Manhattan General Equipment Co. v. Commissioners of Internal Revenue,
297 U.S. 129 (1936) 12

TABLE OF CITATIONS CONTINUED

CASES **PAGE**

McGarth v. City of Philadelphia,
127 Lab.Cas. P 33,060, 1 Wage and Hour Cas.2d (BNA)
1500 (E.D. Pa. 1994) 2

National League of Cities v. Usery,
426 U.S. 833 (1976) 6

Service Employees International Union, Local 102 v.
County of San Diego,
60 F.3d 1346 (9th Cir. 1994) 2, 8, 11, 12, 13

Stewart v. City and County of San Francisco,
834 F.Supp. 1233 (N.D. Cal. 1993) 2

United States v. Darby,
312 U.S. 100 (1941) 3

OTHER AUTHORITIES

PAGE

5 C.F.R. §§ 551.203 7

5 C.F.R. §§ 551.204 7

29 C.F.R. § 541.5d 10

29 C.F.R. § 541.118 ..... 4, 5

29 C.F.R. § 541.118(a) 4, 5

29 C.F.R. § 541.118(a)(1) 5

29 C.F.R. § 541.1(f) 4

29 C.F.R. § 541.2(e) (2) 4

29 C.F.R. § 541.3(e) 4

3 Fed.Reg. 2518 3

19 Fed. Reg. 4406 (July 17, 1954) 5

40 Fed. Reg. 27640 (July 1, 1975) 7

50 Fed. Reg. 47696 (November 19, 1985) 7

51 Fed. Reg. 13402 (April 18, 1996) 7

56 Fed. Reg. 45822 9

56 Fed. Reg. 45828 9

57 Fed. Reg. 37665 ..... 4, 6, 9

57 Fed. Reg. 37666 (August 19, 1992) 6

OTHER AUTHORITIES CONTINUED

PAGE

57 Fed. Reg. 37667 ..... 6, 7, 9

57 Fed. Reg. 37678 ..... 7, 9

H.R. Rep. No. 93-913, (1974) 8

Pub. L.93-259, 88 Stat. 55 6

Rules of the Supreme Court of the United States, Rule 37.5 1

5 U.S.C. § 706(2)(a) 10, 11

29 U.S.C. § 202 3

29 U.S.C. §§ 203(e) 6

29 U.S.C. § 204(f) 7

29 U.S.C. §§ 206 3

29 U.S.C. §§ 207(o) 6

29 U.S.C. §§ 207(p) 6

29 U.S.C. §§ 213 3

29 U.S.C. § 213(a)(1) 3, 10

No. 95-897

In The
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OCTOBER TERM, 1995

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On Writ of Certiorari to the
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for the Eighth Circuit

BRIEF OF AMICUS CURIAE
BROWARD COUNTY, FLORIDA,
IN SUPPORT OF RESPONDENT

STATEMENT OF INTEREST OF AMICUS CURIAE

Broward County, Florida, a political subdivision of the state of Florida, is a local government charged with the responsibility of providing for the welfare of its citizens. This responsibility includes the requirement that Broward County make appropriate determinations as to the manner of compensating its employees. This case will impact on Broward County's determinations regarding that matter.

Because this brief is being submitted by the authorized law officer of a political subdivision of a state, consent for its filing by the parties is not necessary. Rules of the Supreme Court of the United States, Rule 37.5

SUMMARY OF ARGUMENT

The salary basis test for determining which employees are exempt from the Fair Labor Standards Act is not valid as applied to the public sector. Such a conclusion is consistent with legislative intent and accords the proper deference to the interpretation of the FLSA adopted by the Department of Labor. Moreover, the application of the test to the public sector would be inconsistent with the principles of public accountability and with prevailing public sector payroll practices that were developed in light of a historical backdrop that demonstrates the inapplicability of the test.

ARGUMENT

THE SALARY BASIS TEST FOR DETERMINING WHICH EMPLOYEES ARE EXEMPT FROM THE FAIR LABOR STANDARDS ACT IS NOT VALID AS APPLIED TO THE PUBLIC SECTOR.

This brief will address one aspect of the issues dealt with by the present case. Specifically, it will argue that the salary basis test for determining which employees are exempt from the Fair Labor Standards Act (FLSA) is not valid as applied to the public sector. Precisely such a conclusion was reached by the Ninth Circuit in its decision in *Service Employees International Union, Local 102 v. County of San Diego*, 60 F.3d 1346 (9th Cir. 1994). Agreeing with San Diego's contention that the test "is contrary to the FLSA and congressional intent," *id.* at 1351, the court in that case found that the test in existence prior to September 6, 1991, "was invalid in its entirety as applied to the public sector." *Id.* at 1353. Moreover, the Ninth Circuit is not alone in reaching this conclusion. *See Hilbert v. District of Columbia*, 23 F.3d 429, 434-436 (D.C. Cir. 1994), Henderson, J., concurring in part and dissenting in part; *McGarth v. City of Philadelphia*, 127 Lab.Cas. P 33,060, 1 Wage & Hour Cas.2d (BNA) 1500 (E.D. Pa. 1994); *Stewart v. City and County of San Francisco*, 834 F.Supp. 1233, 1238 (N.D. Cal. 1993). A look to the history of the FLSA and to the applicable legal principles demonstrates that the decision in *Service Employees* is well-founded.

A. The Origins of the Act. The FLSA was adopted in 1938 as a

remedial and humanitarian means of recovery from the Great Depression. It was "designed to provide a minimum standard of living necessary for the health, efficiency, and general well-being of workers, as well as to prescribe certain minimum standards of working conditions." *Brennan v. Wilson Building, Inc.*, 478 F.2d 1090, 1094 (5th Cir.), *cert. denied*, 414 U.S. 855 (1973).

The FLSA contains three core provisions. It establishes a minimum wage, requires employers to pay overtime compensation to employees working over a specified number of hours in a week (usually 40), and contains provisions designed to eliminate child labor. 29 U.S.C. §§ 206-213. At the time of its passage, the Act explicitly excluded public employees from coverage. *See* 29 U.S.C. § 202; *United States v. Darby*, 312 U.S. 100 (1941).

From its inception, the FLSA has always exempted "executive, administrative and professional" employees from the overtime and minimum wage provisions of the Act. Instead of defining these terms, Congress delegated this role to the Secretary of Labor.[1]

The first regulations defining the section 13(a)(1) executive, administrative and professional exemptions (the so-called "white collar" exemption) were promulgated on October 20, 1938. 3 Fed. Reg. 2518. These regulations include a provision which survives in identical form today. It states as follows:

> In determining such future regulations separate treatment for different industries and for different classes of employees may be given consideration.

Thus, from its earliest pronouncements, the Department of Labor ("DOL" or "Department") recognized that proper implementation of the section 13(a)(1) exemptions might require it to draw dis-

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[1] Section 13(a)(1), 29 U.S.C. § 213(a)(1), states:
The provisions of sections 206 [wages] and 207 [hours] shall not apply with respect to . . . [a]ny employee employed in a bona fide executive, administrative, or professional capacity . . . (as such terms are defined and delimited from time to time by regulations of the Secretary . . .)

tinctions in the treatment accorded to employees working in different employment settings.

B. The Creation of the Salary Basis Test. In the 1940s and 1950s, the DOL adopted further regulations defining the white collar exemption. *See* 57 Fed. Reg. 37665 (August 19, 1992). These regulations -- which remain essentially unchanged today -- provide two different criteria to be used in determining whether an employee is properly classified as an executive, administrator or professional.

The first criteria, the "duties" test, mandates that an exempt employee must function in a supervisory role, or work in a field requiring the exercise of discretion, judgment, or talent. *See* 29 C.F.R. § 541.1(f), § 541.2(e) (2) and § 541.3(e).

The second criteria, the "salary test," is less widely utilized. It requires employees to receive more than $155 per week ($250 per week using the so-called "short test") and be paid "on a salary basis." *See id.*

Employees will be considered to be paid on a "salary basis" if they receive a "predetermined amount" each pay period, 29 C.F.R. §541.118, subject to certain criteria and exceptions.[2] "The aim of these restrictions is to determine whether an employee actually receives all compensation in the form of a salary or whether the employee is in fact compensated on a variable quantitative or qualitative basis." *Keller v. City of Columbus*, 778 F.Supp. 1480, 1485-86 (S.D. Ind. 1991).

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[2] In the relevant part, the § 541.118 (a) salary besis rule states as follows:

> An employee will be considered to be paid "on a salary basis" within the meaning of the regulations if under his employment agreement he regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed. Subject to the exceptions provided below, the employee must receive his full salary of any week in which he performs any work without regard to the number of days or hours worked. This policy is also subject to the general rule that an employee need not be paid for any workweek in which he performs no work.

Section 541.118 does not permit an employer to reduce -- on either a daily or hourly basis -- the wages of a "salary basis" employee when there is no work available to be performed:

> An employee will not be considered to be paid "on a salary basis" if deductions from his predetermined compensation are made for absences occasioned by the employer or by the operating requirements of the business. Accordingly, if the employee is ready, willing, and able to work, deductions may not be made for time when work is not available.

29 C.F.R. § 541.118(a) (1).

While the primary focus of § 541.118 is on deductions caused by lack of work, the regulation also limits an employer's right to deduct pay from salaried employees who miss work for personal reasons. Under § 541.118(a)(2-4), employers may generally make deductions from an employee's salary for personal reasons, including sickness or disability, if these absences are "for a day or more." Conversely, if these personal absences are for less than a day, the regulations suggest (but do not state explicitly) that deductions are not permitted. 29 C.F.R. § 541.118(a); *see also Donovan v. Carls Drug Co., Inc.*, 703 F.2d 650, 652 (2d Cir. 1983) ("salaried professional employee may not be docked pay for fractions of a day of work missed").

C. Application of the Salary Test to Public Employment. The above-quoted DOL "salary test," first drafted in the 1940s, has remained in its present form since 1954 -- long before the FLSA became applicable to public employers. *See* 19 Fed. Reg. 4406 (July 17, 1954). The regulation was developed from 22 days of hearings and record evidence gathered by the DOL in 1947 from private employers. A DOL review of this regulatory history stated:

> These provisions were developed from extensive hearings and record evidence showing that executive, administrative, and professional employees employed in industries then-subject to the FLSA, *which excluded governmental employees*, were nearly universally paid on a salary basis.

57 Fed. Reg. 37665, 37666 (August 19, 1992) (emphasis added). Public employers did not participate in these hearings because the FLSA did not apply to public employment at the time. *Id.*

In 1974, the FLSA was extended to federal, state and local government employees. Pub. L. 93-259, 88 Stat. 55. This coverage was sharply curtailed, however, by this Court's 1976 decision declaring invalid the FLSA's application to state and local public employees "performing traditional government functions." *National League of Cities v. Usery*, 426 U.S. 833 (1976).

Public employees were again covered by the FLSA in 1985, when this court reversed *National League of Cities* in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985). In *Garcia*, this court reasoned that sufficient authority existed under the Commerce Clause to apply the FLSA to state and local governments and found that applying federal regulation based on a distinction between "traditional" and "nontraditional" governmental functions was unsound and unworkable. *Id.*

In response to *Garcia*, Congress amended the FLSA in November, 1985, to address the particular concerns of state and local governments and to provide relief from liability during a temporary adjustment period. 29 U.S.C. §§ 203(e), 207(o), 207(p); *see also* 57 Fed. Reg. at 37667. In Congress' rush to provide legislative relief, however, one problem that was not recognized was the effect that the DOL's "salary basis" regulation could have on public employers. *See* 57 Fed. Reg. at 37667. For many years prior to *Garcia*, most public employers had operated pay systems "premised on a concept derived from principles of public accountability that governmental employees should not be paid for time not worked due to the need to be accountable to the taxpayers for the expenditure of public funds." *Id.*

In the course of operating such payroll systems, local governments gave their employees accrued leave time, including sick and vacation pay, which the employees were then expected to use to cover various absences -- including absences of less than a day. Any employee, including high-ranking officials, who somehow managed to exhaust his or her leave time, or was absent without leave, was therefore at least theoretically subject to actual reductions in pay. *Id.*

Such reductions made for partial-day absences, however, while consistent with principles of public accountability, could arguably violate a strict, literal construction of § 541.118.

In late 1985, the Department of Labor became aware of this potential conflict between § 541.118 and prevailing public sector payroll practices. In response to a request for public comments, the DOL learned that the existing salary test had at least the potential to jeopardize the availability of the section 13(a) (1) white collar exemption in the public sector. 50 Fed. Reg. 47696 (November 19, 1985); *see also* 57 Fed. Reg. at 37667-68. However, while aware of this theoretical problem, the Department apparently concluded that other regulatory issues deserved more immediate attention. Accordingly, DOL deferred consideration of revisions to the salary test, noting instead that "the Department expects to publish a notice of proposed rulemaking concerning Part 541 during 1987." *Id., quoting* 51 Fed. Reg. 13402 (April 18, 1996).

Unfortunately, the DOL never followed through on its promised rulemaking.[3] Instead, the DOL simply published a letter ruling in 1987 stating (57 Fed. Reg. at 37668 (emphasis added)) that it would not enforce the salary test against public entities:

> It has come to [DOL's] attention that some State and local government jurisdictions have statutory provisions which prohibit any employee from being paid for time not actually worked, or not covered by annual, sick or other type of paid leave. Such statutory provisions conflict with the basis of payment described in § 541.118 of 29 CFR Part 541.

[3] DOL's inaction contrasts sharply with action taken by its counterpart -- the Office of Personnel Management ("OPM", formerly known as the Civil Service Commission) -- which is charged with administering the Act with respect to most federal employees. 29 U.S.C. § 204(f). After the FLSA was extended in 1974 to cover federal employment, OPM promptly issued white collar exemption regulations focusing entirely on the duties test and including *no salary basis requirement*. 40 Fed. Reg. 27640 (July 1, 1975); *see also* 57 Fed. Reg. at 37667. In the preamble to its regulations, OPM stated that its rulemaking was based upon a "policy of integrating exception criteria with Federal classification systems to the extent possible, while maintaining results consistent with the exemption criteria applied by the Department of Labor." *Id.* OPM's current regulations administering the FLSA similarly contain no salary basis test. 5 C.F.R. §§ 551.203; 551.204

> ... This practice is similar to the practice applicable to Federal employees. ... While consideration is given to proposed changes in the regulations, a *nonenforcement policy is being adopted with regard to the salary basis of payment for otherwise exempt public employees.* ... This nonenforcement policy is not intended to affect any employee's rights under Section 16(b) of the FLSA [private enforcement provisions].

However, while the DOL's statement precluded federal enforcement, it did nothing to stop "entrepreneurial" public employees from bringing their own salary basis lawsuits against their employers. As a result, dozens of private actions were initiated across the county to take advantage of this potential regulatory loophole. One such action was *Abshire v. County of Kern*, 908 F.2d 483 (9th Cir. 1990), in which the Ninth Circuit severely penalized a public employer for not meeting its broad interpretation of the § 541.118 salary basis rule.

In announcing that all partial-day payroll deductions were "antithetical to the concept of a salaried employee," the *Abshire* Court made no inquiry into whether its reading of the FLSA reflected the congressional intent underlying the Act.[4] If it had, it would have found that Congress expressly intended to preserve the white collar exemption for public sector employers when it extended coverage to the FLSA in 1974. The committee report accompanying the bill that became the 1974 FLSA amendments states:

> Section 6 of the bill extends minimum wage and overtime coverage to about 5 million *non-supervisory* employees in the public sector not ... [then] covered by the Act. ... The bill will provide that virtually *all non-supervisory government employees* will be covered. . . . By the same token, the committee intends to cover all employees (*except professional, executive, and administrative personnel who are exempted under section 13 of the law*) in all civilian branches of the Federal Government. [H.R. Rep. No. 93-913, p. 27 (1974); emphasis added.]

[4] Indeed, the court recognized as much in its subsequent discussion in *Service Employees*. 60 F.3d at 1354.

57 Fed. Reg. at 37667. Thus, in extending the FLSA to the public sector, Congress evidenced no desire to jeopardize the availability of the section 13(a)(1) white collar exemption to public employers, or to alter the compensations arrangements of public sector executives and other supervisory personnel.

After *Abshire*, the Department of Labor quickly recognized this underlying congressional intent and -- now facing a rulemaking "emergency" -- moved quickly to close the "salary basis" loophole. On September 6, 1991, the DOL promulgated an immediately effective Interim Final Rule, which provided that public sector employees would not lose their white collar exemption simply because they were paid in accordance with a compensation system requiring a payroll deduction for absences of less than one work day. 56 Fed. Reg. 45822. In finding that "few public employers compensate employees in a manner that meets the 'on a salary basis' requirement," the Department criticized *Abshire*, noting that it had exposed "government employers to potentially enormous and generally unexpected back wage liabilities to employees, some of whom would clearly be exempt if duties and amount of compensation alone were examined.[5] *Id.* at 45824-25.

Following a formal notice and comment period, the DOL on August 19, 1992 published its Final Rule on the public sector salary test. 57 Fed. Reg. 37665 (to be codified at 29 C.F.R. § 541.5d). Like the Interim Final Rule, the Final Rule provides that public sector employees who would otherwise be exempt from the FLSA's overtime requirements under section 13(a)(1) do not lose their exemption because their pay is subject to reduction for partial-day absences.

In issuing the Final Rule, the DOL emphasized that the amendment of its regulations was "necessary in order to give effect

[5] At the time it promulgated the Interim Final Rule, the DOL also proposed another regulation which would have "retroactively" restored the white collar exemption to public sector employees whose employers had reimbursed them for any partial-day pay deductions. (56 Fed. Reg. 45828) However, citing concerns over its authority to engage in retroactive rulemaking, the DOL later withdrew its proposed rule. 57 Fed. Reg. 37678. In withdrawing the proposal, the DOL stated its intent to seek retroactive relief for public employers through the legislative process. *Id.*

of the statutory exemption in the public sector as intended by Congress under the 1974 Amendments." *Id.* at 37673. In one of several passages emphasizing this point, the DOL stated as follows:

> [I]t is clear from a plain reading of FLSA's legislative history in 1974 [quoted in the committee report above] that Congress intended for the section 13(a) (1) exemption to be available for public sector employees. Congress was presumably unaware that ... many public sector compensation systems precluded payment for hours not worked ... . In light of the public accountability principles prevalent in public sector pay systems, the regulatory requirements adopted before Congress extended FLSA coverage to state and local governments simply could not operate in a manner that effectively distinguished exempt from non-exempt public employees. *The regulations were thus out of harmony with the intent of the statute* because State and local governments could not practically avail themselves of the exemption intended by Congress, *and thus were inappropriate as applied in the public sector.*

Id. at 37672 (emphasis added).

D. Deference to the Department's Interpretation of the FLSA. Given the broad discretion vested by Congress in the Secretary of Labor to "define" and "delimit" the FLSA, the Department's regulations are vested with "legislative effect." 29 U.S.C. § 213(a) (1); *Batterton v. Francis*, 432 U.S. 416, 428 (1977); *Building & Construction Trades Dept. AFL-CIO v. Donovan*, 712 F.2d 611, 616 (D.C. Cir. 1983), *cert. denied*, 464 U.S. 1069 (1984). Accordingly, this Court should not overrule DOL's interpretation of the section 13(a) (1) exemption unless the agency's definition is one "that bears no relationship to any recognized concept of the [statutory] program." *Id.*

The above-cited standard of review is very narrow: the Department's interpretative regulations may only be set aside if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2) (a). Moreover, a "reviewing court is not entitled to substitute its judgment for that of the agency

... and must defer to the agency if its action has a rational basis in the record." *American Meat Institute v. United State Department of Agriculture*, 646 F.2d 125, 127 (4th Cir. 1981). *See also Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984) (courts must defer to agency's interpretation of statute unless that determination is unreasonable).

The previously cited cases that have found the salary basis test involved with regard to the public sector have applied this approach. In *Service Employees*, 60 F.3d at 1351, the court stated:

> The Administrative Procedure Act ("APA") reflects the familiar principle that courts reviewing agency action will "hold unlawful and set aside agency action, findings, and conclusions found to be ... arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2) (A). *In Chevron U.S.A., Inc. v. Natural Resources Defense Counsel*, 467 U.S. 837, 842-43 (1984), the Supreme Court further defined this test. It stated that if Congress has directly spoken to a precise question and that intent of Congress is clear, "the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* If the "statute is silent or ambiguous with respect to the particular issue, the question is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843.

Service Employees went on to find that Congress was silent as to whether the salary test applies to the public sector and that the question therefore became simply whether the agency's answer was based on a permissible construction of the FLSA. 60 F.3d at 1351.

In this instance, given the careful efforts made by the Department to document public sector payroll practices and examine prevailing public accountability principles -- and the Department's detailed findings concerning the legislative and regulatory intent behind section 13 (a) (1) and section 541.118 -- it cannot be reasonably argued that the Department lacked a "rational basis" for enacting the new public sector salary basis test codified in § 541.5d. Therefore, regardless of prior judicial interpretations of the which collar exemption, this Court should now give full force and effect to the

Department's new salary basis regulation and adopt the same rationale employed by the Ninth Circuit in *Service Employees*.[6]

The same result is also called for by this Court's long-standing "statutory intent" doctrine set forth in *Manhattan General Equipment Co. v. Commissioner of Internal Revenue*, 297 U.S. 129 (1936). In that case, this Court dealt with a situation in which the IRS enacted a new regulation when it found that a previous regulation was contrary to the intent of the underlying legislation. This Court applied the new regulation to a transaction that occurred during the lifetime of the old one, finding that the new regulation "became the primary and controlling rule" and that it "pointed the way, for the first time, for correctly applying the antecedent statute to a situation which arose under the statute." *Id.* at 135.

Here, as the Department has concluded, application of the pre-existing private sector salary basis test to public employment failed to take into consideration the special "public accountability" interests and practices of government employers.[7] Accordingly, this Court should now defer to the Department of Labor's August 1992 salary basis rule.

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[6] The fact that the Department offered a contrary interpretation as an amicus curiae in support of a petition for rehearing in *Service Employees* should not change this conclusion. As the Ninth Circuit concluded in rejecting the claim that deference should be given to this belatedly asserted position, the Department's "pre-September, 1991 'position' was not an engaged interpretation of the statute in light of Congressional intent." *Id.* at 1356. Instead, the Department "simply defaulted on its mandate to interpret the Fair Labor Standards Act and to recast the relevant regulations in the light of a sea change caused by the extension in 1985 and 1986 of the FLSA to nonfederal public employees." *Id.* As the court noted, the Department's nonenforcement policy was "tantamount to an admission by the DOL that the regulation in place, i.e, the salary test, was unsuitable as applied to public employees." *Id.* at 1357. Thus, the Department's position in *Service Employees* amounted to a request "to defer to the DOL's *failure* to discharge its responsibilities under the laws," *Id.* at 1359, an invitation that was properly declined by the court of appeals.

[7] The concept of public accountability permeates both the DOL actions and the cases discussed above. *See Service Employees*, 60 F.3d at 1352, n.2,, citing to *Hilbert*, 23 F.3d at 435, Henderson, J., concurring in part and dissenting in part ("Public accountability is the notion that 'government employees should not be paid for time not worked due to the need to be accountable to the taxpayers for expenditure of public funds.'")

CONCLUSION

The salary basis test was never intended to apply to the public sector. The concept that it did was fostered by the belief that *Abshire* had reached such a conclusion. The decision in *Service Employees*, however, demonstrates both that the issue was never considered in *Abshire* and that the idea that the salary basis test does apply to the pubic sector is without merit. Broward County respectfully submits that the *Service Employees* is correct in both of these conclusions and that this Court should adopt the rationale of *Service Employees* and apply it to the facts of the present case.

Respectfully submitted,
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On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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[Additional *Amici* Continued on Inside Cover]

AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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LABOR RELATIONS ASSOCIATION, AND
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Pursuant to Rule 37.3 of the Rules of this Court, *amici* respectfully move for leave to file the attached brief *amicus curiae* in support of respondents. Respondents have consented to the filing of the brief. This motion is made necessary by petitioners conditioning their consent on the substantive content of the brief, a condition which *amici* found unacceptable.

Amici, organizations whose members include state, county, and municipal governments and officials throughout the United States, have a strong interest in legal issues that affect state and local governments. *Amici* have an especially compelling interest in issues arising from the application of the Fair Labor Standards Act (FLSA) to their workforces. The issue in this case, whether the Department of Labor's salary basis test and disciplinary deduction rule can be applied to determine which state and local government employees are exempt from the FLSA's maximum hours requirement, strikes at the core of this interest.

The Department of Labor promulgated the salary basis test and disciplinary deduction rule during the 1940s and 1950s when the FLSA did not apply to state and local government employers. The rules were thus based exclusively on the practices existing in the private sector. Moreover, in its rulemaking which subjected state and local government employers to the rule, the Department did not study the pay and personnel practices of state and local governments. The Department eventually modified the salary basis test to take into account the public accountability rules which require that state and local government employees at all levels account for their time and which prohibit state and local governments from expending taxpayer funds to pay employees for any time they have not worked. The rules, however, by the Department's own admission, remain "sorely out-of-date," 59 Fed. Reg. 57130 (Nov. 14, 1994), and "are still in need of updating and clarification." 61 Fed. Reg. 23240 (May 13, 1996).

Because the salary basis test and disciplinary deduction rule do not validly identify state and local governments' non-exempt employees, judicial enforcement would nullify Congress' intent to exempt the public sector's "bona fide executive, administrative, or professional" employees from the FLSA's maximum hours standard. 29 U.S.C. § 213 (a)(1). It would provide a windfall to persons such as petitioners who are in every practical sense "executive, administrative, or professional" employees. *See* Pet. App. 14a-35a.

The resolution of this issue will have a substantial impact on the ability of state and local governments to provide essential services to their citizens. *Amici* accordingly move for leave to file the attached brief *amicus curiae* in support of respondents.

Respectfully submitted,

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October 11, 1996

QUESTIONS PRESENTED

Amici will address the following questions:

1. Whether the Department of Labor's salary basis test and its disciplinary deduction rule can validly be applied to state and local government employers.

2. Whether an employee is "subject to" pay docking in the absence of the employer's actual imposition of a sanction which violates the disciplinary deduction rule.

3. Whether a public sector employer can avail itself of the window of correction rule only when it has made an improper deduction through actual mistake or inadvertence.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
INTEREST OF THE *AMICI*	2
STATEMENT	2
SUMMARY OF ARGUMENT	4
ARGUMENT	8
I. THE SALARY BASIS TEST AND ITS DISCIPLINARY DEDUCTION RULE CANNOT BE APPLIED TO THE PUBLIC SECTOR	8
A. Congress Could Not Have Intended That The Salary Basis Test Apply To The Public Sector Because It Does Not Serve As A Valid Proxy For Identifying The Public Sector's Executive, Administrative and Professional Employees	10
B. As Applied To State And Local Government Employers, The Salary Basis Test Is Arbitrary And Capricious And Is Not Entitled To Deference	17
II. AN EMPLOYEE IS NOT "SUBJECT TO" DOCKING UNLESS THE EMPLOYER ACTUALLY IMPOSES A DISCIPLINARY SANCTION WHICH VIOLATES THE RULE	23
III. THE WINDOW OF CORRECTION IS AVAILABLE IN THIS CASE	24
CONCLUSION	26
APPENDIX	1a

TABLE OF AUTHORITIES

Cases — Page

Amshey v. United States, 26 Cl. Ct. 582 (1992), *vacated*, 35 Cl. Ct. 358 (1993) 14
Avery v. City of Talladega, 24 F.3d 1337 (11th Cir. 1994) 15
Balgowan v. New Jersey Dept. of Transp., 84 F.3d 656, *opinion vacated and rehearing granted*, 1996 WL 381898 (3d Cir. 1996) 15
Bowman Transp. Inc. v. Arkansas-Best Freight System, Inc., 419 U.S. 281 (1974) 17
Bowman v. City of Indianapolis, 927 F. Supp. 309 (S.D. Ind. 1996) 15, 22
Carpenter v. City and County of Denver, 82 F.3d 353 (10th Cir. 1996) 15
Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) 10
Childers v. City of Eugene, 922 F. Supp. 403 (D. Or. 1996) 15
Close v. New York, 1996 WL 67979 (N.D.N.Y.), *vacated on other grounds*, 1996 WL 481550 (N.D.N.Y.) 15, 19
Garcia v. San Antonio Metro. Trans. Auth., 469 U.S. 528 (1985) 3-4, 9, 11
Gregory v. Ashcroft, 501 U.S. 452 (1991) 8
Hackett v. Lane County, 91 F.3d 1289 (9th Cir. 1996) 15
Hurley v. Oregon, 27 F.3d 392 (9th Cir. 1994) .....
Jackson v. Kentucky, 892 F. Supp. 923 (E.D. Ky. 1995) 15
Lacey v. Indiana State Police Dept., 810 F. Supp. 244 (S.D. Ind. 1992) 15-16
Lucero v. Regents of the Univ. of Cal., 1993 WL 341287 (N.D. Cal.) 15
McCloskey v. Triborough Bridge & Tunnel Auth., 903 F. Supp. 558 (S.D.N.Y. 1995) 15
McGrath v. City of Philadelphia, 864 F. Supp. 466 (E.D. Pa. 1994) 15
McGuire v. City of Portland, 91 F.3d 1293 (9th Cir. 1996) 15

TABLE OF AUTHORITIES—Continued

Page

Meringolo v. City of New York, 908 F. Supp. 160 (S.D.N.Y. 1995) 15, 19
Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co., 463 U.S. 29 (1983) 17, 19
Mueller v. Reich, 54 F.3d 438 (7th Cir. 1995), *petition for cert. filed*, 64 U.S.L.W. 3297 (U.S. Oct. 10, 1995) (No. 95-586) 15
New York v. United States, 505 U.S. 144 (1992) .. 9
Pautlitz v. City of Naperville, 781 F. Supp. 1368 (N.D. Ill. 1992) 16
Spradling v. City of Tulsa, 1996 WL 518438 (10th Cir.) 15
United States v. Morton, 467 U.S. 822 (1984) 10
Yourman v. Dinkins, 84 F.3d 655 (2d Cir. 1996), *petition for cert. filed*, 65 U.S.L.W. 3110 (U.S. July 29, 1996) (No. 96-152) 15

Statutes And Regulations

5 C.F.R. Pt. 551 ..... 13, 14, 18
29 C.F.R. § 541.1 ..... 2, 16
29 C.F.R. § 541.2 ..... 2, 16
29 C.F.R. § 541.3 ..... 2, 16
29 C.F.R. § 541.118 ..... 12, 22
29 C.F.R. § 541.118(a) 2, 23
29 C.F.R. § 541.118(a) (5) ..... *passim*
29 C.F.R. § 541.118(a) (6) 7, 24-25, 25
5 U.S.C. § 706 17
5 U.S.C. § 7503 ..... 5, 18, 21
5 U.S.C. § 7503(a) 14
29 U.S.C. § 213(a) ..... *passim*
29 U.S.C. § 216(b) 25

Other Authorities

14 Fed. Reg. 7735 (Dec. 28, 1949) 10
19 Fed. Reg. 1321 (Mar. 9, 1954) 10
19 Fed. Reg. 4405 (July 17, 1954) 10
52 Fed. Reg. 2012 (Jan. 16, 1987) 11, 18
57 Fed. Reg. 37666 (Aug. 19, 1992) ..... *passim*
59 Fed. Reg. 57129 (Nov. 14, 1994) 4, 16

TABLE OF AUTHORITIES—Continued

	Page
61 Fed. Reg. 23239 (May 13, 1996)	4, 11-12, 12, 16
Kantor Report (Mar. 3, 1958)	10
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Isidore Silver, *Public Employee Discharge and Discipline* (1995)	14, 19
Ronald D. Sylvia, *Public Personnel Administration* (1994)	14
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Robert G. Vaughn, *Principles of Civil Service Law* (1976)	14
Weiss Report (June 30, 1949)	*passim*
O.W. Wilson, *Police Planning* (2d ed. 1973)	20

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INTEREST OF THE *AMICI*

The interest of the *amici* is set forth in the motion accompanying this brief.

STATEMENT

In enacting the FLSA, Congress exempted from the Act's maximum hours requirements those persons "employed in a bona fide executive, administrative, or professional capacity," and granted the Department of Labor rulemaking authority to "define[] and delimit[] [these terms] from time to time." 29 U.S.C. § 213(a). The salary basis test and its disciplinary deduction rule are exercises of this authority.[1]

The salary basis test and its disciplinary deduction rule were promulgated on the basis of the Department of Labor's study of private sector pay practices during the 1940s and 1950s, years before the FLSA was extended to state and local governments. Based on these studies, the Department concluded that "bona fide executive, administrative and professional employees are almost universally paid on a salary or fee" basis and that such an employee must "receive his full salary for any week in which he performs any work without regard to the number of days or hours worked." *Weiss Report*, June 30, 1949 [J.A. 36, 39]. Thus, as a general rule, the Department's regulations provide that even when an employee performs executive, administrative or professional duties, if the employee's "compensation . . . is . . . subject to reduction because of variations in the quality or quantity of the work performed," the employee is deemed to be hourly and entitled to overtime. 29 C.F.R. § 541.118(a).

The disciplinary deduction rule, *id.* § 541.118(a)(5), is likewise based on the Department's finding that in the

[1] Under the Department's regulations, an employee must meet both a duties test and the salary basis test to be deemed exempt from the FLSA's maximum hours requirement. *See* 29 C.F.R. §§ 541.1; 541.2; 541.3.

private sector during the 1940s, "[t]he disciplining of [executive, administrative and professional] employees in the rare instances where it is needed is usually accomplished in other ways than by deductions from salary." *Weiss Report*, June 30, 1949 [J.A. 39]. The rule supplements the salary basis test by providing that "[p]enalties imposed in good faith for infractions of safety rules of major significance will not affect the employee's salaried status." 29 C.F.R. § 541.118(a)(5). In a reflection of the industrial economy upon which the regulation was based, the rule narrowly defines "safety rules of major significance" to "include only those relating to the prevention of serious danger to the plant, or other employees, such as rules prohibiting smoking in explosive plants, oil refineries, and coal mines." *Id.* While the Department has construed the regulation to authorize disciplinary deductions for the violation of Department of Defense industrial security regulations, *see* U.S. Department of Labor, Wage and Hour Letter (Dec. 24, 1991) [reprinted at Wage & Hour Cas. (BNA) 99:5257], "employees may not be suspended without pay for a day or more where the reason is something other than serious safety violations." U.S. Department of Labor, Wage and Hour Letter (Mar. 30, 1994) [reprinted at Wage & Hour Cas. (BNA) 99:5290].[2]

As the Department has previously acknowledged, these rules were promulgated on the basis of hearings "conducted before the public sector became subject to the FLSA [and] did not include an examination of prevailing governmental pay practices." 57 Fed. Reg. 37672 (Aug. 19, 1992). The Department nonetheless applied the rules to state and local government employers after *Garcia v.*

[2] *See also* U.S. Department of Labor, Wage and Hour Letter (March 29, 1991) [reprinted at Wage & Hour Cas. (BNA) 99:8003] ("Disciplinary deductions made from the salary of an RN for violating [hospital and state] rules relating to patient well-being and job performance are not the type of deductions that would be permitted by section 541.118(a)(5) of the regulations.").

San Antonio Metro. Trans. Auth., 469 U.S. 528 (1985), held that the Tenth Amendment did not prohibit Congress from applying the FLSA to the States.

Thus, shortly thereafter DOL was confronted with the reality that state and local government employers are subject to public accountability rules which require that employees at all levels account for their time in hourly increments and prohibit the expenditure of taxpayer funds to employees for any time they have not worked. *Id.* at 37667. The Department recognized that the salary basis test does not reflect public sector pay practices and that to apply it would effectively nullify the intent of Congress by denying state and local governments the exemption for their executive, administrative and professional employees. *Id., see also id.* at 37670, 37673.

While the Department amended the salary basis test to account for public accountability principles, it did not revisit the disciplinary deduction rule. *Id.* at 37674. The Department has thus subsequently recognized that "[t]hese revisions were limited in nature," that "the regulations are sorely out-of-date," and that "the regulations are still in need of updating and clarification, especially with regard to applicability to public sector employment." 59 Fed. Reg. 57129-30 (Nov. 14, 1994). The Department has recently reaffirmed this view. *See* 61 Fed. Reg. 23239 (May 13, 1996).

SUMMARY OF ARGUMENT

1. The salary basis test and its disciplinary deduction rule do not validly identify executive, administrative and professional employees of state and local governments who are exempt from the FLSA's maximum hours requirement. The regulations thus cannot be applied to state and local government employers without violating Congress' intent

to exempt these employees from the FLSA's maximum hours requirement.

The Department of Labor promulgated the salary basis test and its disciplinary deduction rule in the 1940s and 1950s on the basis of studies it conducted of the private sector. In theory, one of the hallmarks of being a "bona fide executive, administrative, or professional" employee, 29 U.S.C. § 213(a)(1), is that such an employee is paid on a salary basis and is disciplined through sanctions which do not include deductions from pay or short term suspensions.

The Department has acknowledged, however, that these rules were created on the basis of hearings "conducted before the public sector became subject to the FLSA [and] did not include an examination of prevailing governmental pay practices." 57 Fed. Reg. 37672 (Aug. 19, 1992). Moreover, in extending the rule to state and local government employers, the Department did not comprehensively study the disciplinary systems of state and local government employers to determine the extent to which they rely on the ability to impose partial pay period suspensions on their executive, administrative and professional employees in order to maintain discipline and efficiency in the workforce.

The federal government—which is far more analogous to state and local government employers than the private sector—does not utilize the salary basis test and the disciplinary deduction rule in applying the FLSA to itself. Indeed, the federal government exercises statutory authority to suspend all levels of employees in the competitive service (including those who are FLSA-exempt) for less than a full pay period "for such cause as will promote the efficiency of the service." 5 U.S.C. § 7503. This authority, which is far broader than that allowed under the disciplinary deduction rule, is itself strong evidence that the use of short term suspensions is a necessary tool for maintaining discipline and efficiency of employees at all levels in the public sector workforce. It demonstrates that

the premise which underlies the rule does not apply in the public sector and that the Labor Department should have engaged in a careful study to determine whether extension of the rule to state and local government employers was justifiable.

The extensive litigation that has already occurred on the applicability of the rule to state and local government employers is further testament to the importance to state and local governments of having authority to impose short term suspensions on their executive, administrative and professional employees. It likewise demonstrates that the premise of the Department's disciplinary deduction rule does not apply in the public sector and that the rule is not a valid proxy for determining whether state and local government employees are exempt. This being the case, judicial enforcement of the rule would violate Congress' intent to exclude state and local governments' executive, administrative and professional employees from the FLSA's maximum hours provision.

2. The Department's extension of the salary basis test and its disciplinary deduction rule to state and local government employers was arbitrary and capricious and thus violates the Administrative Procedure Act. The Department entirely failed to consider whether the premise which supported the rule's initial application to the private sector in the 1940s and 1950s also supports its extension to state and local government employers. It failed to do so even though the federal government does not apply these rules to itself in implementing the FLSA and has statutory authority to impose suspensions of less than a pay period on all employees in the competitive service.

The rule is also irrational. The Labor Department has explained that employers do not violate the rule if they suspend an employee for a full week even when the employee is paid on a bi-weekly basis. But if the point of the rule is to differentiate between salaried and hourly employees, it is illogical to allow suspensions for less than

the employee's full pay period. Moreover, because public employees at all levels do not control their own time but are paid only for work they actually perform, a suspension for less than a week is not probative of whether they are salaried or hourly employees.

3. The court of appeals correctly held that an employee is not "subject to" docking unless an employer actually imposes a disciplinary sanction which violates the rule. Petitioners' contention that they are subject to docking merely because the police manual authorizes suspensions of less than a week ignores that the manual, for each offense, also authorizes sanctions which do not violate the rule. Indeed, because for each offense the police manual provides a penalty range which includes a suspension of five days or more—which does not violate the rule—it is disingenuous for petitioners to contend that they are responding to the prospect of receiving a suspension which violates the rule. It is also unreasonable because it presumes that in the event an exempt employee violates the police department's rules, the department will respond by imposing a sanction which violates the disciplinary deduction rule. Absent the actual imposition of pay docking which violates the rule, there is no basis for concluding that the employer will not comply with the FLSA in disciplining its employees.

4. The window of correction rule is not limited to instances where an improper suspension is the result of the employer's "actual mistake or inadvertence." Pet. Br. 43. The plain language of the rule clearly—and disjunctively—provides that where a deduction "is made for reasons other than lack of work, the exemption will not be considered to have been lost." 29 C.F.R. § 541.118(a)(6). Contrary to petitioners' contention, an employer cannot make repeated deductions with impunity, because if it does the employee will be deemed to be hourly and entitled to overtime as well as liquidated damages and attorney's fees as provided by the FLSA. Petitioners' construction of the regulation would in the case of iso-

lated deductions defeat Congress' purpose by providing windfalls to employees who are in every sense "bona fide executive, administrative, or professional employees," 29 U.S.C. § 213(a), and exempt from the FLSA's maximum hours standard.

ARGUMENT

I. THE SALARY BASIS TEST AND ITS DISCIPLINARY DEDUCTION RULE CANNOT BE APPLIED TO THE PUBLIC SECTOR

When it extended the Fair Labor Standards Act to employees of state and local governments, Congress clearly expressed its intent that the FLSA's maximum hours provision "shall not apply with respect to . . . any employee employed in a bona fide executive, administrative, or professional capacity." 29 U.S.C. § 213(a). The salary basis test and its disciplinary deduction rule are an exercise of the Secretary of Labor's rulemaking authority under Section 213 to "define[] and delimit[]" these terms "from time to time." *Id.*

As an initial matter, *amici* note that this case presents a serious question as to whether Congress can delegate broad authority to an administrative agency which can be exercised in a manner that is as disruptive of the federal-state balance as has been done here. *Cf. Gregory v. Ashcroft*, 501 U.S. 452, 460-61 (1991). The Department's disciplinary deduction rule, which was devised based on private sector practices, is no more than a tertiary test for determining whether an employee is FLSA-exempt. Yet the Department's reflexive application of that rule to public sector employers seriously intrudes into the structure and sovereign functions of state and local governments by directly affecting how those governments organize and discipline law enforcement and other core personnel.

Judicial endorsement of this practice would enable Congress to evade political accountability for intrusive

policy choices in a manner that is not contemplated by the Constitution. *Cf. New York v. United States*, 505 U.S. 144, 162-63, 169 (1992). It would also circumvent the process of Congressional lawmaking for the protection of the States' interests which the Court relied upon in *Garcia v. San Antonio Metro. Trans. Auth.*, 469 U.S. 528 (1985). Congress cannot be presumed to have intended that highly technical rules developed by the Department for the private sector would be reflexively applied to the States, with such patently disruptive consequences.

Moreover, as explained more fully below, the regulation, which is, of course, simply a tool for implementing the FLSA, is premised on practices which do not obtain in the public sector. The regulation cannot be validly applied to public sector employers because it conflicts with Congress' intent to exempt "bona fide executive, administrative, or professional employees" from the FLSA's maximum hours protection. Furthermore, the Department's extension of the rule to state and local government employers is an arbitrary and capricious exercise of its rulemaking authority. Judicial enforcement of the regulation also threatens to subject state and local government employers to massive overtime liability, with disastrous consequences for their ability to provide essential government services.[8] The Court should accordingly declare the regulation void as applied to States and local governments.

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[8] *See* Letter from Director, Office of Management & Budget to Secretary of Labor (Apr. 14, 1994) (reprinted in Appendix) ("[D]ue to the outdated nature of the section 541 regulations, some highly compensated public sector employees with responsibilities that would normally exempt them from coverage may be eligible for overtime, a situation that could cost State and local governments hundreds of millions of dollars.").

A. Congress Could Not Have Intended That The Salary Basis Test Apply To The Public Sector Because It Does Not Serve As A Valid Proxy For Identifying The Public Sector's Executive, Administrative and Professional Employees

Any agency rule which conflicts with Congress' intent is void. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984); *United States v. Morton*, 467 U.S. 822, 834 (1984). The salary basis test and its disciplinary deduction rule, as applied to public sector employers, is manifestly contrary to Congress' intent to exclude executive, administrative and professional employees from the FLSA's maximum hours provisions and therefore cannot be judicially enforced.

The purpose of the salary basis test is to identify those persons who are "employed in a bona fide executive, administrative, or professional capacity" and are thus exempt from the FLSA's maximum hours protection under the statute's terms. 29 U.S.C. § 213(a); *Kantor Report*, March 3, 1958 [reprinted at J.A. 42]. In theory, "payment on a salary (or fee) basis is one of the recognized attributes of administrative and professional employment," as such individuals "are normally allowed some latitude with respect to the time spent at work." *Weiss Report*, June 30, 1949 [reprinted at J.A. 36-38]. As the *Weiss Report* further explained, "bona fide executive, administrative, and professional employees are almost universally paid on a salary or fee" rather than an hourly basis. *Id.* [J.A. 36].

Public sector employers were not, however, subject to the FLSA when the Labor Department promulgated the salary basis test and its component disciplinary deduction rule in 1949 and 1954 respectively. *See* 14 Fed. Reg. 7735 (Dec. 28, 1949); 19 Fed. Reg. 1321 (Mar. 9, 1954) (notice of proposed rulemaking); 19 Fed. Reg. 4405 (July 17, 1954) (final rule); *see also* 57 Fed. Reg. 37672 (Aug. 19, 1992). Accordingly, public sector employers

had no reason to participate in the rulemaking proceedings and the Department had no reason to study their employment practices in devising the rule. *See id.* While the salary basis test and the disciplinary deduction rule may still accurately reflect the nature of private sector pay practices, it is undeniable that these rules were promulgated without the Secretary ever having studied whether they reflect the realities of the public sector workplace, which they most assuredly do not. As the Secretary has acknowledged, these regulations were created on the basis of hearings "conducted before the public sector became subject to the FLSA [and] did not include an examination of prevailing governmental pay practices." *Id.*

In the aftermath of *Garcia v. San Antonio Metro. Trans. Auth.*, 469 U.S. 528 (1985), and the Fair Labor Standards Amendments of 1985, the Department promulgated its rules subjecting state and local government employers to the FLSA, including the salary basis test. At that time, DOL was confronted with the reality that public accountability principles ordinarily require state and local government employees at all levels to account for their time in hourly increments and forbid state and local governments from expending taxpayer funds to pay employees for any time they have not worked. *See* 52 Fed. Reg. 2012, 2019 (Jan. 16, 1987). The Department subsequently recognized that because of public accountability principles it is contrary to Congress' intent to apply the salary basis test to public sector employers. *See* 57 Fed. Reg. 37672 (Aug. 19, 1992).

The disciplinary deduction rule is no more validly applied to determine whether public sector employees are bona fide executive, administrative or professional employees than was the abandoned partial day docking rule. To judicially enforce the disciplinary deduction rule in suits brought against state and local government employers would be especially untoward given the Department's acknowledgment that "[b]ecause of the limited

nature of th[is] revision[], the regulations are still in need of updating and clarification." 61 Fed. Reg. 23240 (May 13, 1996).

The salary basis test, 29 C.F.R. § 541.118, mandates that an FLSA-exempt employee "must receive his full salary for any week in which he performs any work," subject to a few exceptions. One of these exceptions is the disciplinary deduction rule, which provides:

> Penalties imposed in good faith for infractions of safety rules of major significance will not affect the employee's salaried status. Safety rules of major significance include only those relating to the prevention of serious danger to the plant, or other employees, such as rules prohibiting smoking in explosive plants, oil refineries, and coal mines.

Id. § 541.118(a)(5). This rule is understood to mean that the salary basis test is violated (and an employee's FLSA exemption is lost) by the employer's imposition of a penalty suspension without pay of less than a week, unless the penalty is imposed for the violation of a major safety rule.

As stated above, the disciplinary deduction rule is based on the Department's study of private sector pay practices in the largely industrial economy of the 1940s and 1950s. *See* 61 Fed. Reg. 23240 (May 13, 1996). In theory, one of the hallmarks of being a "bona fide executive, administrative, or professional employee" is that one's salary is not subject to a disciplinary sanction which includes the deduction of pay. *See Weiss Report,* J.A. 39. As the *Weiss Report* states, "[t]he disciplining of such employees in the rare instances where it is needed is usually accomplished in other ways than by deduction from salary." *Id.* But as the *Weiss Report* makes clear, this premise is based on the Department's study of exclusively private sector pay practices. *See id.,* J.A. 37-39.

Even in the private sector, however, the notion that disciplinary deductions are inconsistent with status as an executive, administrative or professional employee is hardly inviolate. The disciplinary deduction rule itself, for example, allows employers to impose disciplinary deductions on exempt employees for the violation of "safety rules of major significance" without deeming them to have violated the salary basis test. 29 C.F.R. § 541.118(a)(5). Moreover, during World War II, the Department ruled that employers could impose disciplinary deductions "to discourage absenteeism among executive and administrative employees" without running afoul of the salary basis test. *Weiss Report,* J.A. 37.

These instances in which the Department determined that disciplinary deductions are not inconsistent with status as an exempt employee, presumably because employers had a substantial need for retaining this authority, should have strongly suggested to the Department that study of the public sector was necessary before the rule was reflexively extended to it. In extending the rule, however, the Department did not comprehensively study the disciplinary systems of state and local government employers to determine the extent to which they rely on the ability to impose partial pay period suspensions on their executive, administrative or professional employees in order to maintain discipline in the workforce. *See* 57 Fed. Reg. 37674. Instead, the Department appears to have erroneously assumed (the Department having never set forth its justification) that the private sector practice applies equally to the public sector.

The most powerful indication that this rule manifestly does *not* fit public sector personnel practices is that in applying the FLSA to itself, the federal government—which is far more analogous to state and local government employers than the private sector—does not utilize the salary basis test and the disciplinary deduction rule. *See* 5 C.F.R. Pt. 551. Most significantly, the federal gov-

ernment exercises statutory authority to suspend all levels of employees in the competitive service (including those who are FLSA-exempt) "for 14 days or less [which is less than a full pay period] for such cause as will promote the efficiency of the service." 5 U.S.C. § 7503(a). This is, of course, a far broader authority than that allowed under the disciplinary deduction rule. *See, e.g.*, 1 Isidore Silver, *Public Employee Discharge And Discipline* § 3.23, at 185 (1995); Robert G. Vaughn, *Principles Of Civil Service Law* § 5.4 (1976).

That the federal government both subjects FLSA-exempt employees to short term suspensions and does not apply the disciplinary deduction rule to itself is strong evidence that the use of short term suspensions is a necessary tool for maintaining discipline and efficiency of employees at all levels in the public sector workforce. *See* G. Jerry Shaw & William L. Bransford, *The Federal Manager's Handbook* 60-61 (1994) (discussing use of short term suspension as part of a system of progressive discipline); Ronald D. Sylvia, *Public Personnel Administration* 306-07 (1994) (describing central role of short term suspension in the progressive discipline systems universally used in public sector). It is also strong evidence that the premise which underlies the rule does not apply in the public sector.[4] At a minimum, it should have suggested to the Labor Department that extensive study was necessary to determine whether extension of the rule to state and local government employers was justifiable.

[4] Asserting that "[l]aw enforcement Sergeants and Lieutenants in the federal sector are covered by the salary basis test and its 'subject to' discipline rule and are non-exempt," petitioners' *amici*, International Union of Police Associations *et al.*, cite *Amshey v. United States*, 26 Cl. Ct. 582 (1992), *vacated*, 35 Cl. Ct. 358 (1993). *See* Br. *Am. Cur. IUPA* 6 n.5. The vacated *Amshey* opinion provides no authority for IUPA's contention. The Office of Personnel Management and not the Labor Department implements the FLSA in the federal workplace; its regulations do not include a salary basis test and disciplinary deduction rule. *See* 5 C.F.R. Pt. 551.

It is no answer to say that the Department did so when, during the course of its public accountability rulemaking, it discussed and rejected several comments submitted on behalf of public employers which sought modification of the disciplinary deduction rule. *See* 57 Fed. Reg. 37674 (Aug. 19, 1992); Br. *Am. Cur.* AFL-CIO at 9-10. As the Department itself acknowledged, the disciplinary deduction rule "was not open for comment during the [public accountability] rulemaking." 57 Fed. Reg. 37674. That being the case, it is no surprise that only a small portion of the comments submitted by public employers pointed out the rule's infirmity.

The federal government's rejection of the rule is not, however, the only compelling evidence of its unsuitability for application to other public sector employers. The extensive litigation that has already occurred on the applicability of the rule to public sector employment is itself strong testament to the widespread use by state and local governments of such deductions in disciplining their executive, administrative and professional employees.[5]

[5] *See Spradling v. City of Tulsa*, 1996 WL 518438 (10th Cir.); *McGuire v. City of Portland*, 91 F.3d 1293 (9th Cir. 1996); *Hackett v. Lane County*, 91 F.3d 1289 (9th Cir. 1996); *Balgowan v. New Jersey Dept. of Transp.*, 84 F.3d 656, *opinion vacated and rehearing granted*, 1996 WL 381898 (3d Cir. 1996); *Yourman v. Dinkins*, 84 F.3d 655 (2d Cir. 1996), *petition for cert. filed*, 65 U.S.L.W. 3110 (U.S. July 29, 1996) (No. 96-152); *Carpenter v. City & County of Denver*, 82 F.3d 353 (10th Cir. 1996); *Mueller v. Reich*, 54 F.3d 438 (7th Cir. 1995), *petition for cert. filed*, 65 U.S.L.W. 3297 (U.S. Oct. 10, 1995) (No. 95-586); *Avery v. City of Talladega*, 24 F.3d 1337 (11th Cir. 1994); *Hurley v. Oregon*, 27 F.3d 392 (9th Cir. 1994); *Bowman v. City of Indianapolis*, 927 F. Supp. 309 (S.D. Ind. 1996); *Childers v. City of Eugene*, 922 F.Supp. 403 (D. Or. 1996); *Close v. New York*, 1996 WL 67979 (N.D.N.Y.), *vacated on other grounds*, 1996 WL 481550 (N.D.N.Y.); *Meringolo v. City of New York*, 908 F. Supp. 160 (S.D.N.Y. 1995); *McCloskey v. Triborough Bridge & Tunnel Auth.*, 903 F. Supp. 558 (S.D.N.Y. 1995); *Jackson v. Kentucky*, 892 F. Supp. 923 (E.D. Ky. 1995); *McGrath v. City of Philadelphia*, 864 F. Supp. 466 (E.D. Pa. 1994); *Lucero v. Regents of the Univ. of Cal.*, 1993 WL 341287 (N.D. Cal.); *Lacey v. Indiana State Police Dept.*, 810 F. Supp. 244 (S.D.

This stands in stark contrast to the practice in the private sector, as found by the Department nearly fifty years ago, that "deductions [from salary] are rarely made . . . . The disciplining of such employees in the rare instances where it is needed is usually accomplished in other ways than by deductions from salary." *Weiss Report*, J.A. 39 (footnote omitted). That the premise of the Department's disciplinary deduction rule does not apply in the public sector demonstrates that the rule is not a valid proxy for determining whether such employees are exempt as executive, administrative or professional employees. Because an employer must satisfy both the duties test and the salary basis test (including the disciplinary deduction rule) to prove its entitlement to treat employees as exempt, *see* 29 C.F.R. §§ 541.1; 541.2; 541.3, judicial enforcement of the Department's rule would undermine Congress' intent to exclude such employees of state and local governments from the FLSA's maximum hours provision. It would be especially inappropriate in light of the Department's recent declarations that the regulation is "sorely out-of-date," 59 Fed. Reg. 57130 (Nov. 14, 1994), and is "still in need of updating and clarification." 61 Fed. Reg. 23240 (May 13, 1996).

The salary basis test and disciplinary deduction rule serve their purpose of identifying exempt employees only to the extent they reflect the pay and personnel practices of the private and public sectors. Because the rules—with the exception of the public accountability amendments—do not reflect the practice of state and local governments, they are not valid proxies for determining whether their employees are within the Section 213 exemption. The Department's reflexive application of the rules to state and local government employers has led to highly disruptive consequences that Congress could never have intended. The Court should therefore declare the rules void as applied to them.

Ind. 1992); *Pautlitz v. City of Naperville*, 781 F. Supp. 1368 (N.D. Ill. 1992).

B. As Applied To State And Local Government Employers, The Salary Basis Test Is Arbitrary And Capricious And Is Not Entitled To Deference

As discussed above, Congress could not have intended that the salary basis test and its disciplinary deduction rule apply to the public sector. But even if the rule is reviewed under the more deferential "arbitrary" and "capricious" standard of the Administrative Procedure Act, *see* 5 U.S.C. § 706, it cannot be sustained. The rule thus cannot be judicially enforced in private party suits against state and local governments.

The Court has made clear that the scope of review under the arbitrary and capricious standard is "narrow," and that it does "not . . . substitute its judgment for that of the agency." *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Nonetheless, the Court will set aside an agency rule if it is irrational or not "based on consideration of the relevant factors." *Id.* at 42; *see also Bowman Transp. Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285 (1974). The Court has further explained that "[n]ormally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, [or] entirely failed to consider an important aspect of the problem." *Motor Vehicle Mfrs.*, 463 U.S. at 43. The disciplinary deduction rule is arbitrary and capricious on several counts.

First, in extending the rule to state and local government employers, the Department has "entirely failed to consider an important aspect of the problem," *id.*, namely, whether the rule's premise is valid in the public sector. As explained above, the Department promulgated the salary basis test and disciplinary deduction rule on the basis of private sector practices during the 1940s and 1950s. It extended the rules to state and local government employers without adequate study to determine whether the premises which support application of the

rule to the private sector apply as well in the public sector. *See* 52 Fed. Reg. 2019 (Jan. 16, 1987). It did so even though the federal government, which is also subject to the FLSA and which is far more analogous to the state and local government workplace than the private sector, does not apply the salary basis test in determining whether their employees are within the exemption. *See* 5 C.F.R. Pt. 551. That the federal government does not apply the rule to itself should have given the Department a strong indication that further study was necessary to determine whether the rules could be validly applied to state and local governments.

Remarkably, the Department promulgated these rules notwithstanding that state and local government employers had forewarned it that the salary basis test conflicted with the public accountability rules which prohibit the payment of wages in the absence of work. *See* 52 Fed. Reg. 2019 (Jan. 16, 1987). While the Department eventually amended the salary basis test to take into account public accountability rules, albeit in a process which took five and a half years to complete, *see* 57 Fed. Reg. 37674 (Aug. 19, 1992), the Department, in extending the disciplinary deduction rule to public sector employers has "entirely failed to consider" the most fundamental issues.

Because the Department did not study the disciplinary practices of public sector employers, it had no basis to conclude that the premise of the rule—that employers rarely impose deductions from salary or partial pay period suspensions as sanctions for misconduct by executive, administrative or professional employees—holds true in the public sector. Yet it had only to look no further than the practice of the federal government to determine that the use of such suspensions is deemed by the Nation's largest public employer to be a vital tool for maintaining workplace efficiency and discipline. *See* 5 U.S.C. § 7503; Shaw, *The Federal Manager's Handbook* at 60. Having never studied the disciplinary systems of public sector employers,

including the restraints on employers' use of disciplinary sanctions imposed by state and local governments' civil service rules as well as by collective bargaining agreements,[6] *see* Silver, *Public Employee Discharge And Discipline* §§ 1.2 & 1.3, at 3-5, the Department has failed to consider the intrusive impact of its rule on state and local governments.[7] And it is simply not credible to argue that Congress has sanctioned the Department's extension of the rule to state and local governments, *see* Pet. Br. 27-28, when it expressly provides federal workforce managers with the very authority which the Department's rule denies state and local governments.

The Department's failure to study the impact of its rule is a fatal omission given the patently compelling need of public sector employers to maintain a high level of dis-

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[6] One of the more pernicious effects of the Department's rule is that it undermines collectively bargained agreements. Even when public employees have agreed through collective bargaining that the employer should have authority to impose disciplinary suspensions of less than a week, the Department has ruled that such suspensions render an employee non-exempt. *See* U.S. Department of Labor, Wage and Hour Letter (March 29, 1991) [reprinted at Wage & Hour Cas. (BNA) 99:8003]. *See also Close v. New York*, 1996 WL 67979, at *7 (employees were not FLSA-exempt even though "collective bargaining agreement provide[d] for the discipline of employees," including fines and suspensions without pay); *Meringolo v. City of New York*, 908 F. Supp. at 163, 169 (holding that first line supervisory corrections officers were not FLSA-exempt even though collective bargaining agreement covered treatment of disciplinary violations).

[7] *Amici* do not suggest that formal hearings of the sort conducted by the Department in promulgating the original rule are required. *See generally Weiss Report*, J.A. 36-41. The Department, however, like any other agency, has the burden of studying the regulated area and justifying its rule. *See Motor Vehicle Manufacturers*, 463 U.S. at 43. In this respect the Department has totally failed to meet its burden of justifying the imposition of the rule on state and local governments.

cipline among their employees in certain areas of employment, especially those engaged in law enforcement duties.[8] As one authority explains, "[t]he police service, like the military, has traditionally demanded high standards of discipline from its members. Employee behavior is controlled by police agencies to a greater degree than in most professions or services." National Advisory Commission on Criminal Justice Standards and Goals. *Police* 469 (1973). *See also* Pet. App. 102a-149a (City of St. Louis Police Department Manual) (enumerating disciplinary rules and range of disciplinary sanctions for violations); O.W. Wilson, *Police Planning* 339-79 (2d ed. 1973) (Duty Manual Excerpts, Portland, Maine, Police Department); Br. *Am. Cur.* International Union of Police Associations 26 ("a disciplinary code is an important part of the paramilitary structure" of a police department). Law enforcement officers are granted extraordinary authority. The importance to state and local governments of maintaining

[8] Indeed, private sector employers only infrequently impose pay deductions on their executive, administrative and professional employees for the violation of major safety rules (as permitted by the disciplinary deduction rule), because such employees are unlikely to commit such violations. The rule nonetheless allows employers to make these deductions without running afoul of the salary basis test; it does not limit employers to other sanctions. *See* 29 C.F.R. § 541.118(a)(5). Presumably this is because employers have a demonstrable need to maintain employee adherence to their safety rules, and other sanctions are either too light or too harsh.

If important private sector employer interests warrant an exception to the rule even when such discipline is likely to be infrequent, it is hard to understand why the Department has failed to examine whether public sector employers have similarly pressing needs. This is particularly true with respect to such public sector employers as police and fire departments as well as medical facilities, where employees are entrusted with the lives and safety of the citizenry and have traditionally been subject to a wide range of disciplinary sanctions. *See, e.g.*, Pet. App. 102a-149a (St. Louis Police Manual).

high standards of discipline is self-evident.[9] The Labor Department's extension of the rule while failing to even consider its impact on state and local governments is an abuse of its rulemaking authority.

Beyond the Department's failure to justify the extension of the rule to state and local governments, the rule is, as a substantive matter, irrational and therefore void. The purpose of the rule is to differentiate between exempt "executive, administrative, and professional employees [who]

[9] The Sergeants and Lieutenants contend that the docking rule "is operationally reasonable." Pet. Br. 35. They further contend that:

> Public employers need not claim that they *must* suspend sergeants and lieutenants for periods of less than a week for rule infractions. Other forms of discipline are superior. Suspensions in pay remove such needed officers from the streets of our communities and other important law enforcement duties. Moreover, for an overworked sergeant or lieutenant, a day or two "vacation" may not be viewed as disciplinary at all.

Id.

This argument trivializes the significance of short term suspensions for maintaining discipline. It likewise demeans the professionalism of the Sergeants and Lieutenants. The only sense in which a day or two suspension can be characterized as a "vacation" is if, by dint of the Labor Department's rule, state and local governments are required to pay a disciplinee's salary during such a suspension or lose the exemption. It is also a perverse argument because if employers are denied the flexibility to impose short suspensions, they will likely choose to impose suspensions of at least a week's length to remain in compliance with the rule.

State and local police administrators are already subject to ample restraints on their ability to choose appropriate disciplinary sanctions in the form of state and local regulations and collective bargaining agreements. They are quite capable of determining—without the guidance of the federal government—whether in a particular case an officer should be suspended from duty or receive some other sanction. To subject state and local police administrators to additional restraints in the form of the disciplinary deduction rule is especially impudent in light of the federal government's broad authority to impose short term suspensions on its own FLSA-exempt employees. *See* 5 U.S.C. § 7503.

are almost universally paid on a salary or fee basis" and hourly employees. *See Weiss Report*, J.A. 36. As the Department explained nearly fifty years ago, "payment of anything less than the full salary seems to cast doubt upon the bona fide character of the employee's executive, administrative, or professional status." *Id.*, J.A. 39.

The Department has ruled, however, that an employer does not violate the rule when it suspends an employee for a full week even when the employee is paid on a bi-weekly basis. U.S. Department of Labor, Wage and Hour Letter (March 29, 1991) [reprinted at Wage & Hour Cas. (BNA) 99:8003]. If the point of the rule is to differentiate between salaried and hourly employees, it is irrational to allow suspensions for less than the employee's full pay period. To be sure, that the Department permits employers to impose suspensions of a week even when employees are paid on a bi-weekly basis is a dispensation to employers. It nonetheless demonstrates that the rule has no foundation in logic.[10]

Moreover, the salary basis test is based on the premise that exempt executive, administrative and professional employees control their own time. But as the Department has recognized, public accountability principles require state and local government employers to pay their employees only for the work they perform. This being the case, a suspension of less than a week is not probative of whether an employee is an hourly employee because all employees

[10] The rule's irrationality is demonstrated by the fact that even when it is undisputed that an employee meets the Labor Department's duties test, the imposition of a disciplinary deduction of less than a week will result in the employee being deemed non-exempt. *See, e.g.*, 29 C.F.R. § 541.118. Thus, if the Police Board imposed a short term suspension on the Chief of Police for a minor rules violation, the Chief would be deemed non-exempt. As one court has observed, "we do not think it is rational to consider such suspensions as conclusive evidence that an employee is hourly." *Bowman v. City of Indianapolis*, 927 F. Supp. at 315.

who are subject to public accountability rules are subject to pay docking for the days they do not work, no matter how substantial their duties are.

As the foregoing demonstrates, the Labor Department's extension of the salary basis test and its disciplinary deduction rule to state and local governments was arbitrary and capricious. The Court should therefore declare it void.

II. AN EMPLOYEE IS NOT "SUBJECT TO" DOCKING UNLESS THE EMPLOYER ACTUALLY IMPOSES A DISCIPLINARY SANCTION WHICH VIOLATES THE RULE

It is manifest that the Department's rules, as applied to state and local government employers, are contrary to Congress' intent and are arbitrary and capricious. Nonetheless, the sergeants and lieutenants also take issue with the court of appeals' holding that the mere fact that the City's police manual provides for disciplinary suspensions of less than a week does not result in their pay being "subject to reduction because of variations in the quality . . . of the work performed." 29 C.F.R. § 541.118(a); *see also* Pet. Br. 38-43. They assert that they are "subject to" docking and are thus not salaried because they

> know that as a practical matter they are subject to disciplinary suspensions for a portion of their work period's compensation. Employees covered by a widely publicized disciplinary code know that they are covered and respond accordingly, whether or not they or their work mates have actually been docked. The very purpose of disciplinary docking rules is to discourage the conduct prohibited.

Pet. Br. 40 (footnote omitted).

This argument is meritless. It ignores that the St. Louis police manual not only authorizes suspensions that, if imposed, would violate the disciplinary deduction rule, it also

provides for sanctions for each offense which do not. *See* Pet. App. 143a-49a. As a practical matter then, the Sergeants and Lieutenants know that for each offense they are also "subject to" disciplinary sanctions that do not violate the rule, such as reprimands, suspensions of at least five days, and, in some cases, dismissals. *See id.* Given that for every offense the police manual provides a penalty range which includes a suspension of at least five days, it is disingenuous to suggest, as petitioners do, that they are "responding" to the prospect of receiving a shorter suspension which would violate the rule.

Moreover, the Sergeants and Lieutenants erroneously assume that in the event one of them violates the disciplinary code, the police department will respond by imposing a sanction which violates the rule. The police department is entitled to a presumption that it will impose discipline in a manner that is consistent with preserving the FLSA exemption. The recognition of this presumption is warranted because public employers are likely to have written their disciplinary codes unaware of the Labor Department's rule. For example, the police manual at issue here applies "to all commissioned members of the [d]epartment," Pet. App. 107a, which includes both employees who are covered by the overtime provisions and those who are exempt. Absent the actual imposition of pay docking of less than a week's duration, there is no credible basis for concluding that the employer will not comply with the FLSA in disciplining its employees. To hold overwise would exalt a technicality over reality, provide windfalls to employees who are clearly within the exemption, and presume without warrant that public employers have violated the FLSA.

III. THE WINDOW OF CORRECTION IS AVAILABLE IN THIS CASE

The Sergeants and Lieutenants further err in asserting that the "window of correction" rule, 29 C.F.R. § 541.118

(a)(6), does not allow St. Louis to retain the exemption by reimbursing Sergeant Guzy for his two day suspension. *See* Pet. Br. 43-45. They argue that the window is unavailable because the deductions made here were not the result of "actual mistake or inadvertence," *id.* at 43, and that "[t]he Eighth Circuit's ruling would permit an employer to intentionally act in a manner inconsistent with the salary basis test with impunity." *Id.* at 44.

This argument ignores the plain language of the regulation and overstates the consequence of the Eighth Circuit's holding. Contrary to petitioners' suggestion, the regulation does not state that the window is available only when a deduction has been made by "actual mistake or inadvertence." Pet. Br. 43. Rather, the regulation clearly—and disjunctively—provides that "where a deduction not permitted by these interpretations is inadvertent, or is made for reasons other than lack of work, the exemption will not be lost." 29 C.F.R. § 541.118(a)(6). As the court of appeals correctly recognized, "because the regulation is written in the disjunctive, it is not material that the deduction from Sergeant Guzy's pay was not inadvertent, as long as it was made for reasons other than lack of work." Pet. App. 9a-10a n.7.

Nor does the court of appeals' holding allow employers "to intentionally act in a manner inconsistent with the salary basis test with impunity." Pet. Br. 44. Here, the court of appeals determined that Sergeant Guzy's suspension "was a one-time incident." Pet. App. 10a. Contrary to the view of the Sergeants and Lieutenants, an employer cannot make repeated disciplinary deductions with "impunity," because if it does the employee will be deemed to be non-salaried and entitled to overtime, as well as "an additional equal amount as liquidated damages" and attorney's fees. 29 U.S.C. § 216(b).

The court of appeals' holding simply recognizes that where there is an isolated instance of an improper deduction, the proper remedy is to reimburse the employee

for the pay that has been docked and not to give the employee the windfall of years of back overtime pay. This is entirely consistent with the purpose of the FLSA's maximum hours standard, which as petitioners' *amicus* the AFL-CIO emphasizes, "is not intended to increase workers' compensation, but rather to create a financial incentive for employers to spread available work and reduce the dangers of overwork." Br. *Am. Cur.* AFL-CIO at 5. Petitioners' construction of the window of correction regulation is thus not only at odds with the rule's plain language, it would in the case of isolated deductions defeat Congress' purpose by providing windfalls to employees who are in every sense "bona fide executive, administrative, or professional employees," 29 U.S.C. § 213(a), and exempt from the FLSA's maximum hours standard.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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October 11, 1996

APPENDIX

[OMB Logo]

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
Washington, D.C.

THE DIRECTOR

[Apr. 14, 1994]

Honorable Robert Reich
Secretary of Labor
Washington, D.C. 20210

Dear Mr. Secretary:

It has recently come to my attention that the section 541 regulations of the Fair Labor Standards Act (FLSA), which govern the payment of overtime, are currently the subject of numerous court cases involving employers and employees in the public sector. There is some prospect that similar court cases will continue to arise until the present regulations are reworked to take into account today's highly-educated, service-oriented workforce. The court cases suggest that, due to the outdated nature of the section 541 regulations, some highly compensated public sector employees with responsibilities that would normally exempt them from coverage may be eligible for overtime, a situation that could cost State and local governments hundreds of millions of dollars. I understand that your staff is fully aware of this issue.

I would appreciate it if the Department of Labor would undertake a comprehensive review and revision of the FLSA overtime regulations, as they apply to the public sector, to make them workable in today's economy. I also would urge you to work with the Office of Personnel Management (OPM) to ensure consistency, to the degree possible, between your Department's regulations and OPM's regulations as they apply to public sector employees.

My staff would be pleased to work with your staff in framing the scope of this review. I think such an understanding would be an excellent good government exercise. It would dovetail with your effort to improve and streamline the Department's enforcement of Federal labor laws and the Department's quest to ready the American worker and workplace for the 21st Century.

Thank you.

Sincerely,

Original Signed by
Leon E. Panetta
LEON E. PANETTA
Director

BEST AVAILABLE COPY

TABLE OF CONTENTS

		Page
TABLE OF AUTHORITIES		iii
INTEREST OF *AMICI CURIAE*		1
INTRODUCTION AND SUMMARY OF ARGUMENT		3
ARGUMENT		6
I.	LOSS OF EXEMPT STATUS FOR EMPLOYEES WHO SUFFER NO REDUCTION IN PAY IS INCONSISTENT WITH THE SALARY BASIS REGULATIONS	6
	A. The Regulations Prohibit Only Actual Pay Deductions	6
	B. The Regulations Do Not Support a "Practical Matter" Test	13
II.	LOSS OF EXEMPT STATUS FOR EMPLOYEES WHO SUFFER NO REDUCTION IN PAY IS INCONSISTENT WITH THE FLSA	18
III.	THE REGULATORY PROHIBITION ON PARTIAL-WEEK SUSPENSION FOR VIOLATION OF WORKPLACE RULES IS IRRATIONAL AND CONTRARY TO THE FLSA	23

CONCLUSION 27

TABLE OF AUTHORITIES

Page(s)

Cases:

Abshire v. Kern County, 908 F.2d 483 (9th Cir. 1990), *cert. denied*, 498 U.S. 1068 (1991) *passim*

Barner v. City of Novato, 17 F.3d 1256 (9th Cir. 1994) 17

Barrentine v. Arkansas-Best Freight System, Inc., 450 U.S. 728 (1981) 18

Brooklyn Savings Bank v. O'Neil, 324 U.S. 697 (1945)..... 5,19

Carpenter v. City & County of Denver, Colorado, 82 F.3d 353 (10th Cir. 1996), *pet. for cert. pending* (No. 95-2088)..... 12

Dole v. Malcolm Pirnie, Inc., 758 F.Supp. 899 (S.D.N.Y. 1991)..... 14

Garcia v. San Antonio Metro. Transit Authority, 469 U.S. 528 (1985)..... 4

Klein v. Rush-Presbyterian-St. Lukes Med. Ctr., 990 F.2d 279 (7th Cir. 1993) 17,22

Martin v. Malcolm Pirnie, Inc., 949 F.2d 611 (2d Cir. 1991), *cert. denied*, 506 U.S. 905 (1992).....12,14,21

Martin v. Monks, 1993 U.S. App. LEXIS 20610 (6th Cir. 1993) 14

McGuire v. City of Portland, Oregon, 91 F.3d 1293 (9th Cir. 1996) 22,23

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Shalala v. Guernsey Memorial Hosp., 115 S.Ct. 1232 (1995)..... 15

Thomas Jefferson Univ. v. Shalala, 114 S.Ct. 2381 (1994).....15,16

Statutes and Regulations:

Fair Labor Standards Act, 29 U.S.C. §§ 201, *et seq.*.....*passim*

29 U.S.C. § 206(a)..... 18

29 U.S.C. § 207(a)..... 18

29 CFR § 541.1 6,18

29 CFR § 541.2..... 6,18

29 CFR § 541.3..... 6,18

29 CFR § 541.5d 7

29 CFR § 541.118(a) .....*passim*

48 CFR §§ 30.000 *et seq.* 21

48 CFR §§ 31.000 *et seq.* 21

48 CFR § 52.216-6..... 21

48 CFR § 52.216-17 21

Other Authority:

57 Fed. Reg. 37,666 (Aug. 19, 1992)..... 7

57 Fed. Reg. 37,676 (Aug. 19, 1992)..... 17

James S. Holt & Alan E. Simon, *The Private Sector Costs of the Department of Labor's Pay Docking Policy* (Employment Policy Foundation 1992) 5

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Opinion Letter of the Wage-Hour Administrator No. 1733, Lab. L. Rep. (CCH) ¶ 32,331 (April 15, 1994)..... 17

INTEREST OF *AMICI CURIAE**

The Chamber of Commerce of the United States of America ("Chamber") is a federation of approximately 215,000 companies and several thousand other organizations such as state and local chambers of commerce and trade and professional associations. It is the largest association of business and professional organizations in the United States.

A significant aspect of the Chamber's activities involves representation of the interests of member-employers before the courts, the United States Congress, the Executive Branch, and independent regulatory agencies of the federal government. Accordingly, the Chamber has sought to advance those interests by filing briefs *amicus curiae* in a wide spectrum of labor and employment cases.

The Fair Labor Standards Act Reform Coalition ("Coalition") includes Aetna Life & Casualty Company, American International Group, Inc., American Consulting Engineers Council, American Institute of Certified Public Accountants, The Boeing Company, Buck Consultants, Computer Sciences Corporation, Deloitte & Touche L.L.P., Fireman's Fund Insurance Company, General Electric Company, IBM Corporation, Information Technology Association of America, John Alden Life

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* The parties have consented to the filing of this brief. *Amici* have filed letters of consent with the Clerk.

Insurance Company, Mutual of Omaha Insurance Company, National Technical Services Association, Newspaper Association of America, Northrop Grumman Corporation, Price Waterhouse L.L.P., Rockwell, and Tenneco Inc. Coalition members are, or represent, employers of large numbers of professional, executive, and administrative employees, who are exempt from the overtime provisions of the Fair Labor Standards Act, 29 U.S.C. §§ 201, *et seq.* ("FLSA"). The Coalition represents the interests of its members before the courts, Congress, and the Department of Labor in an effort to preserve these exemptions where appropriate, as well as to reform them to reflect the realities of the modern workplace.

The Chamber and the Coalition file the present brief to urge rejection of an interpretation of the FLSA exemption for bona fide executive, administrative, and professional employees that has led to massive and unintended overtime liability among private sector employers. That interpretation would remove from the exemption entire classes of salaried employees because of the mere theoretical possibility that such employees could have their pay docked in violation of the Department of Labor's salary basis regulations. Classwide overtime backpay liability divorced from any actual pay deductions is inconsistent with salary basis regulations and with the FLSA itself.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case affords the Court an opportunity to put to an end an irrational interpretation of the FLSA exemption for bona fide executive, administrative, and professional employees. That interpretation has removed from the exemption the very employees it is meant to include. Department of Labor regulations establish as one requirement for exempt status the payment of employees on a "salary basis." Further regulations defining "salary basis" preclude an employer from, among other things, docking a salaried employee's wages for absences from work of less than a day. In a series of recent decisions, some federal courts—and, at times, the Department of Labor—have concluded that an employer's policy that might result in partial-day docking or other reductions in pay contrary to the "salary basis" requirements will result in loss of exempt status for *all* employees whose pay might have been docked pursuant to the policy, for the entire time the policy is in place, regardless of whether any affected employee actually suffered a loss of pay. This conclusion is contrary to the salary basis regulations, and contrary to the FLSA, which establish that exempt status under the Act is to be determined on an individual, week-to-week basis. The effect of an actual deduction in pay contrary to the salary basis regulations may be loss of exempt status for the affected employee during the week in which the deduction occurred, or it may be only that the employer must repay the employee for the deduction, but in no case is there any effect unless the employee actually suffers a reduction in pay.

This had been the understanding of "salary basis" among private employers for more than 40 years following the Department of Labor's initial promulgation of the salary basis requirement. As the petitioners note, there was "no controversy" about the salary basis test as late as 1986. Petrs'. Br. at 4 n.3. But in a series of cases beginning in the late 1980s—brought initially by public employees who became subject to the FLSA following this Court's decision in *Garcia v. San Antonio Metro. Transit Authority*, 469 U.S. 528 (1985)—courts began to hold that the mere existence of employee attendance and other disciplinary rules, even if rarely or never implemented, could result in loss of exempt status for entire classes of employees. The result has been an explosion of litigation[1] and massive retroactive overtime liability to highly-compensated executive, administrative, and professional employees who are not the intended beneficiaries of the FLSA.

Although these cases arose initially in response to accountability rules in public employment, a high percentage of the lawsuits that followed involved private employers. The real and potential effects of this expanded

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[1] The seminal decision was *Abshire v. Kern County*, 908 F.2d 483 (9th Cir. 1990), *cert. denied*, 498 U.S. 1068 (1991). In the 41 years between promulgation of the salary basis regulations and *Abshire*, only 123 federal court decisions discussed "salary basis" in the context of the FLSA, and many of those are from the late 1980s. In the 6 years since *Abshire*, there have been 161 such decisions. Search of Westlaw Federal Labor Law Database (Sept. 16, 1996).

FLSA liability in the private sector have been devastating. In one case alone, a private engineering and planning firm was made to pay more than $500,000 for two years of overtime backpay to a class of professional employees who had suffered either minimal partial-day pay deductions or, in most cases, none at all. *Reich v. Malcolm Pirnie, Inc.*, 821 F.Supp. 905, 910 (S.D.N.Y. 1993), *on remand from*, 949 F.2d 611 (2d Cir. 1991), *cert. denied*, 506 U.S. 905 (1992). The estimated potential overtime backpay liability in the private sector from full enforcement of the newly expanded salary basis rule, as it applies only to partial-day docking, is nearly $39 billion. James S. Holt & Alan E. Simon, *The Private Sector Costs of the Department of Labor's Pay Docking Policy* (Employment Policy Foundation 1992). The results in recent salary basis lawsuits—including individual awards of tens of thousands of dollars in retroactive overtime payments to highly-trained professional and executive employees already earning incomes far above the national average—demonstrates in stark terms how far afield these courts have strayed from enforcing a statute designed to aid the "unprotected, unorganized and lowest paid of the nation's working population." *See Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697, 707 n.18 (1945).

ARGUMENT

I. LOSS OF EXEMPT STATUS FOR EMPLOYEES WHO SUFFER NO REDUCTION IN PAY IS INCONSISTENT WITH THE SALARY BASIS REGULATIONS

A. The Regulations Prohibit Only Actual Pay Deductions

Following passage of the FLSA in 1938, the Department of Labor established the requirements for the Act's exemption of bona fide executive, administrative, and professional employees. The regulatory definitions rely primarily on the duties performed by such employees, but also require that these employees be paid "on a salary basis." 29 CFR §§ 541.1(f), 541.2(e), 541.3(e).

The regulations define "on a salary basis" in general terms in 29 CFR § 541.118(a). An employee is paid on a salary basis if pay is independent of the amount of work performed in any particular week. Subject to certain exceptions, "the employee must receive his full salary for any week in which he performs any work without regard to the number of days or hours worked." 29 CFR § 541.118(a). A salaried employee is paid a fixed amount each week and is expected to work however long it takes (within reason) to get the job done.

Sections 541.118(a)(1) through (a)(5) establish specific additional rules employers must follow in paying exempt employees on a salary basis. *See* 29 CFR § 541.118(a)(1) (no partial-week deductions due to lack of available work for the employee); 541.118(a)(2) (no partial-

day deductions for absence from work for personal reasons);[2] 541.118(a)(3) (no partial-day deductions for absence from work due to sickness or disability); 541.118(a)(4) (no partial-week deductions for absence from work for jury duty, attendance as a witness, or temporary military leave); 541.118(a)(5) (no partial-week pay penalties for violation of workplace rules other than safety rules of major significance). Finally, section 541.118(a)(6) describes the consequences of failing to follow these rules. This regulatory provision establishes that failure to follow the (a)(1) through (a)(5) pay rules may result in loss of exempt status, but only for the employee whose pay is actually affected by the pay violation, and only for the weeks during which the violation occurs.

The specific regulatory rules in sections 541.118(a)(1) through (a)(5) allow certain partial-week and partial-day pay deductions for exempt employees, and disallow others. These regulations make a key distinction between loss of pay resulting from lack of work available for the employee and loss of pay resulting from the employee's absence from work or from disciplinary measures. When an employee is not paid during part of a

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[2] In response to the uproar created by *Abshire* and its progeny, the Department of Labor in 1992 added a new 29 CFR § 541.5d that removes the partial-day docking rule from the salary basis test for public employers subject to public accountability rules. 57 Fed. Reg. 37,666 (Aug. 19, 1992). The partial-day docking rule remains in full force for private employers.

week because there is no work available, in violation of section 541.118(a)(1), the employer is tying the employee's pay to the amount of work performed (as opposed to time spent on the job, or compliance with workplace conduct rules), contrary to the basic definition of "salary basis." Accordingly, "[a]n employee will not be considered to be 'on a salary basis' if deductions from his predetermined compensation are made for absences occasioned by the employer or by the operating requirements of the business." 29 CFR § 541.118(a)(1). "Where deductions are generally made when there is no work available, it indicates that there was no intention to pay the employee on a salary basis." *Id.* at § 541.118(a)(6). The effect of such deductions is that "the exemption would not be applicable to [the employee] during the entire period when such deductions were being made." *Id.*

In contrast, pay deductions that violate one of the other section 541.118(a)(1) through (a)(5) pay deduction rules—deductions that are made for reasons other than lack of work—do not mandate loss of exempt status; section 541.118(a)(1) is the only one of the five pay deduction rules that specifies that the employee "will not considered to be 'on a salary basis'" if the employer makes a deduction contrary to the rule. Pay deductions in violation of sections 541.118(a)(2) through (a)(5) do not jeopardize the employee's salaried or exempt status if the employer eventually pays the money: "[W]here a deduction not permitted by these interpretations is inadvertent, *or is made for reasons other than lack of work*, the exemption will not be considered to have been lost if the employer reimburses the employee for such deductions and promises to comply in the future." 29 CFR § 541.118(a)(6) (emphasis added).

This regulatory scheme is consistent with employers' traditional authority to control the on-the-job conduct of employees, including salaried employees. Employers retain the authority under the salary basis regulations to monitor conduct and demand attendance in the workplace from salaried employees. An employer could, consistent with the regulations, terminate or suspend (for a period of a week or more) a salaried employee who showed up for work only a few hours a day; "salary basis" does not mean that employees are completely free to come and go as they please. Salaried employees enjoy a degree of flexibility in their work hours, but an employer has an obligation to ensure a certain regularity in hours for the benefit of clients and customers and for the coordination of work between employees.[3] Similarly, the regulations allow an employer to punish safety and other workrule violations by salaried employees with termination or suspension for a period of a week or more.

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[3] The AFL-CIO disagrees. In its *amicus* brief in this case, the AFL-CIO argues that an employer may not attempt to monitor or control the work hours of exempt employees: "Exempt employees manage themselves and others, they are not the managed." AFL-CIO Br. at 13. The AFL-CIO asks for nothing less than a revolution in wage-hour law. Employers routinely, and understandably, require some regularity of hours from managers and supervisors who exercise direct control over hourly workers. The AFL-CIO would eliminate exempt status for all of these executive and administrative employees because they are "managed" by more senior personnel.

Employee monitoring and control is consistent with exempt status, but the salary basis regulations require that such control not take certain forms. There may be no partial-day docking for absences from work, and no partial-week suspension for violation of minor safety rules, for example. In essence, sections 541.118(a)(2) through (a)(5) impose terms on the employment agreement between the employer and exempt employees. *See* 29 CFR § 541.118(a) (referring to the salaried employee's "employment agreement"). Violation of those terms does not render the employee nonexempt; it simply entitles the employee to compensation in accordance with the terms of the agreement. *See* 29 CFR § 541.118(a)(6) (the employer must reimburse the employee and promise to comply in the future).[4]

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[4] The petitioners contend that the so-called "window of correction" under section 541.118(a)(6)—whereby an employer can repay deductions to an employee and promise future compliance—is available only to correct inadvertent deductions, and that all other deductions should result in loss of exempt status. This argument ignores the plain language of the regulatory provision, which allows correction where a deduction is "inadvertent, *or* is made for reasons other than lack of work." (emphasis added) The petitioners contend that allowing correction for noninadvertent partial-week disciplinary suspensions would permit the employer to violate the salary basis test "with impunity," knowing that correction can always be made later. Petrs'. Br. at 44. As *amici* have explained, however, the salary basis regulations

[Footnote continued on next page]

Under the plain terms of section 541.118(a)(6), pay deductions in violation of the salary basis rules may result either in loss of exempt status during the period of such deductions in those circumstances where it appears the employer did not intend to pay the employee on a salary basis (e.g., where deductions are made because there is no work for the employee), or may simply require the employer to pay back money owed to the employee and promise compliance in the future. In no case, however, is exempt status lost for salaried employees who have suffered no deduction in pay.

The petitioners, and the Department of Labor, have derived from the phrase "subject to" in section 541.118(a) a rule that an otherwise salaried employee may lose exempt status merely because of the *possibility* of deductions that are contrary to sections 541.118(a)(1) through (a)(5), even if no such deductions actually occur.[5] This reading is

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[Footnote continued from previous page]

call for loss of exempt status only when deductions are made for lack of work. The other requirements, 541.118(a)(2) through (a)(5), are akin to required contractual provisions. Just as the party to any contract may breach "with impunity," as long as the other party receives its expectation measure of damages, so too can an employer make a (pointless) prohibited pay deduction for reasons other than lack of work, which it will then have to repay.

[5] Although the Department of Labor believes that loss of exempt status is not appropriate in this case, the rule the Department advocates would lead, and has led, in other cases

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inconsistent with the structure of the regulations, and in particular with the language of section 541.118(a)(6), which describes the effects of violation of the rules. Section 541.118(a)(6) explains that, even in those cases in which an employer has violated section 541.118(a)(1) by docking pay for lack of work, and thereby has demonstrated the lack of intention to pay the employee on a salary basis, the effect is loss of exempt status only for the period during which such docking occurred and only for the employee whose pay was docked: "The effect of *making* [such] a deduction" is loss of the exemption "applicable to *him* during the entire period *when such deductions were being made.*" 29 CFR § 541.118(a)(6) (emphasis added). The petitioners and the Department of Labor, on the other hand, would read into the regulations an entirely inconsistent additional provision that the mere possibility of pay deductions for violations of the section 541.118(a)(2) through (a)(5) rules (violations the regulations do *not* define as indicative of a lack of intention to pay on a salary basis) can lead to loss of exempt status over a far longer period of time and for an entire class of employees. The regulations plainly will not support such an implied rule. In light of the language and structure of the

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to loss of exempt status for broad categories of executive, administrative, and professional employees who never suffered any pay deductions that violate the salary basis regulations. *E.g.*, *Martin v. Malcolm Pirnie, Inc.*, 949 F.2d 611 (2d Cir. 1991), *cert. denied*, 506 U.S. 905 (1992); *Carpenter v. City & County of Denver, Colorado*, 82 F.3d 353 (10th Cir. 1996), *pet. for cert. pending* (No. 95-2088).

salary basis regulations as a whole, and the emphasis of the FLSA on individualized week-to-week overtime determinations, *see infra* 18, the words "subject to" in section 541.118(a) will not carry the weight the petitioners and the Department of Labor put on them.

B. The Regulations Do Not Support a "Practical Matter" Test

The petitioners and the Department of Labor enunciate nearly identical salary basis rules, with different results. The petitioners contend that "[s]alaried status is absent whenever employees know that *as a practical matter* they are subject to disciplinary suspensions for a portion of their work period's compensation." Petrs'. Br. at 40 (emphasis added). According to the Department of Labor, "salaried status is lost under the regulations only when employees are 'subject to' such a disciplinary suspension *as a practical matter*." Br. for U.S. as Amicus Curiae on Pet. for Cert. at 10 (emphasis original). The petitioners and the Department of Labor nonetheless reach opposite conclusions as to whether the employees in this case lost their salaried status—strong evidence of the disutility of this "practical" test.

The petitioners do not explain the source of their "practical matter" rule. The Department of Labor relies for its present interpretation on the language in section 541.118(a)(6) that the effect of making a deduction not permitted under the regulations "will depend upon the facts in the particular case." The Department argues in effect that anything is possible "in a particular case," and therefore that the mere possibility of pay deductions not permitted by the regulations will support loss of exempt

status, and retroactive overtime liability, for a class of employees in the proper (practical) case.

Unfortunately, the Department has yet to make up its mind as to what its regulations mean, and employers are left without adequate guidance. The Department's current nuanced approach is in sharp contrast to its earlier position in such cases as *Martin v. Malcolm Pirnie, Inc.*, 949 F.2d 611 (2d Cir. 1991), *cert. denied*, 506 U.S. 905 (1992), and *Martin v. Monks*, 1993 U.S. App. LEXIS 20610 (6th Cir. 1993). As the petitioners have described, the Department of Labor argued to the courts in those cases that employees should lose exempt status in *all* cases in which an employer has a policy that might lead to partial-day deductions, regardless of deductions actually made: "[T]hat seldom, if ever, was the pay of the employees docked is not determinative of the issue presented. ... 'The dispositive factor is that under the policy, the employee's pay is at all times "subject to" deductions.'" Secretary of Labor's Brief in *Dole v. Malcolm Pirnie, Inc.*, 758 F.Supp. 899 (S.D.N.Y. 1991) at 20-21 (quoting *Abshire*, 908 F.2d at 487). *See also* Petrs'. Br. at 3a-5a (quoting similar language from the Secretary of Labor's briefs before other courts). Even this is a recent position. During the first 41 years of the salary basis regulations, prior to the Ninth Circuit's decision in *Abshire*, the Department of Labor had never argued that an employee could lose exempt status in the absence of actual pay docking.

The Department now has opted for an intermediate facts and circumstances approach under which an employer may be liable to employees who have suffered no deduction in pay, but where such liability will depend, among other things, on the number and type of employees covered by an

employer's policy that might lead to impermissible deductions, the number and instances of impermissible deductions, and the circumstances surrounding those deductions. Br. for U.S. as Amicus Curiae on Pet. for Cert. at 10. The Department of Labor thus has left itself, and the courts, complete discretion to impose liability on employers, and has left employers with almost no rules to guide their conduct.[6]

The Department's new interpretation, like its prior position that actual pay docking is irrelevant, is mistaken

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[6] A majority of this Court, in two recent opinions, has indicated that agency interpretations are particularly suspect where, as here, they grant to the agency unbridled discretion to enforce the law as the agency sees fit in each case. *See Thomas Jefferson Univ. v. Shalala*, 114 S.Ct. 2381, 2393 (1994) (Thomas, J., dissenting, joined by Stevens, O'Connor & Ginsburg, JJ.) ("[A]gency rules should be clear and definite so that affected parties will have adequate notice concerning the agency's understanding of the law. ... An agency whose powers are not limited either by meaningful statutory standards or ... legislative rules poses a serious threat to liberty and to democracy.") (internal quotations omitted); *Shalala v. Guernsey Memorial Hosp.*, 115 S.Ct. 1232, 1241, 1244 (1995) (O'Connor, J., dissenting, joined by Scalia, Souter, and Thomas, JJ.) (Secretary of Health and Human Services required to promulgate regulations establishing default accounting principles, and be bound by them, rather than "circumvent the [regulatory] amendment process" by issuing only informal guidance).

and contrary to the regulatory language.[7] The language in section 541.118(a)(6) referring to the "facts in the particular case," upon which the Department of Labor relies, applies by its terms to those cases in which an employer has "ma[de] a deduction" not permitted by the regulations; it does not apply, as the Department would have it, to any case in which an employer *might* make a deduction. The "facts in the particular case" will determine whether the effect of such a deduction is loss of exempt status during the period of such deductions, or whether the employer may simply repay the amount deducted and promise future compliance. There is no option under section 541.118(a)(6) for a salaried employee to lose exempt status when the employee has never lost a penny of pay. There are no "facts in the particular case" of "making a deduction" if no deduction has been made.

The salary basis regulations, like the FLSA as a whole, are geared to *individual* determinations. The effect in a "particular case" of making deductions where no work

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[7] The Department's latest interpretation of its regulations, such as it is, is entitled to little or no deference. While an agency's interpretation of its own regulations is generally to be followed unless "it is plainly erroneous or inconsistent with the regulation," substantially less deference is due when an agency has put forth inconsistent interpretations, as the Department of Labor has done with regard to section 541.118(a). *See Thomas Jefferson Univ.*, 114 S.Ct. at 2386, 2388. In any event, the Department's latest interpretation is plainly erroneous and inconsistent with the regulations.

is available is loss of exempt status "applicable to *him* [the individual employee] during the entire period when such deductions were being made." 29 CFR § 541.118(a)(6). The Department of Labor seeks to derive from a regulatory provision establishing that the effect of a deduction will depend on the facts of the *particular* case, a rule that an employer's policy that leads to no or few deductions can lead to loss of exempt status for a broad class of employees. This is not reliance on the facts of a particular case; it is lawless discretion.[8]

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[8] Fear that any improper pay deduction may lead to retroactive overtime liability to an entire class of employees creates overdeterrence among employers. Some courts have suggested that an employer may violate the partial day docking rule of section 541.118(a)(2) by requiring employees to deduct time from their accrued *leave* for partial day absences, with no loss of pay. *Abshire*, 908 F.2d at 487 n.3; *Klein v. Rush-Presbyterian-St. Luke's Med. Ctr.*, 990 F.2d 279, 284 (7th Cir. 1993). These dicta are almost certainly in error. *E.g., Barner v. City of Novato*, 17 F.3d 1256, 1261-62 (9th Cir. 1994); Opinion Letter of the Wage-Hour Administrator No. 1733, Lab. L. Rep. (CCH) ¶ 32,331 (April 15, 1994); 57 Fed. Reg. 37,676 (Aug. 19, 1992). But the mere possibility that a court might find even one such leave deduction unlawful, and thereby trigger classwide backpay, will motivate employers to restructure or eliminate leave policies that are otherwise beneficial for both employers and employees.

II. LOSS OF EXEMPT STATUS FOR EMPLOYEES WHO SUFFER NO REDUCTION IN PAY IS INCONSISTENT WITH THE FLSA

Even if the salary basis regulations could reasonably be read to support loss of exempt status for salaried employees who have never suffered loss of pay, as the petitioners and the Department of Labor argue, this Court would have to reject that interpretation of the regulations because it is contrary to the underlying statute.

The FLSA is designed to provide individualized relief from excessive work hours on a week-to-week basis to low-paid employees. "[T]he FLSA was designed to give specific minimum protections to *individual* workers." *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 739 (1981) (emphasis original). Both the minimum wage and maximum hour requirements of the statute apply per employee "workweek." 29 U.S.C. §§ 206(a), 207(a). Similarly, the exemption for bona fide executive, administrative, and professional employees—an exception to the minimum wage and maximum hour requirements—must be determined each week based on the specific functions performed and wages received by the employee in that week. *See* 29 CFR §§ 541.1(e), 541.2(d), 541.3(d), 541.118(a)(6). Yet the petitioners and the Department of Labor would hold employers liable for overtime compensation to otherwise exempt employees during any period of time the employer had a partial-day docking or workrule violation policy in place, regardless of whether the policy ever resulted in any deduction in pay from any of those employees during any of the time in question.

The FLSA is Depression-era legislation meant "to help those who toil in factory and on farm." Message from the President of the United States, H.R. Doc. No. 255, 75th Cong., 1st Sess. (May 24, 1937). It was designed to ensure a minimum wage and a reasonable workweek for those workers who do not have sufficient bargaining power to achieve fair working conditions. "[D]ue to the unequal bargaining power as between employer and employee, certain segments of the population required federal compulsory legislation." *Brooklyn Savings Bank*, 324 U.S. at 706. The Act exempts executive, administrative, and professional employees precisely because these skilled individuals have sufficient leverage and a sufficient level of responsibility that they do not need external protection from low wages and too much work. These employees are by definition *exempt* from FLSA overtime and minimum wage requirements, and their employers are free from the requirements of closely monitoring work hours and paying these employees one-and-a-half times their already high rate of pay for hours worked over 40 in a week. The petitioners' and Department of Labor's salary basis rules turn this statutory scheme on its head by creating a set of entitlements for these highly-paid employees under the aegis of the FLSA.

The FLSA gives to the Department of Labor the authority to promulgate regulations defining the executive, administrative, and professional employees who are exempt from the Act. The Department established as one requirement of exempt status payment of wages on a salary basis. The Department then further defined "salary basis" in section 541.118(a), including particular pay docking rules. The Department thereby created entitlements under

the authority of the FLSA—such as the prohibition on partial-day docking, the prohibition on partial-week suspension for violation of workplace rules other than major safety violations, and the payment of full salary during periods of jury duty—among the very executive, administrative, and professional employees who are supposed to be exempt from the requirements of the FLSA.

There is a strong argument that the creation of such regulatory protections for employees meant to be exempt from the Act is beyond the Department of Labor's statutory authority.[9] The petitioners and the Department of Labor have taken things a step further. They contend that the protections of nonexempt status under the FLSA should be extended to executive, administrative, and professional employees who have not even suffered the pay deductions the salary basis regulations prohibit. There is no statutory basis for such a conclusion. The FLSA's prohibitions on sweatshop conditions for unprotected workers will not

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[9] *Amici* argue *infra* that the regulatory provision related to penalties for violation of workplace rules, section 541.118(a)(5), is irrational and inconsistent with the statute. It is possible to make similar arguments about other of the specific rules under sections 541.118(a)(2) through (a)(4). *Amici* do not press any of those broader arguments here, but do contend that *application* of rules, such as the prohibition on partial-day docking, to produce an overtime backpay windfall for highly-compensated executive, administrative, and professional employees who have never had their pay docked, is contrary to the statute.

support a rule that requires overtime payments to a highly-trained engineer who in theory *could* have pay docked for taking the afternoon off to attend a baseball game.

The irrational results that follow when courts accept the petitioners' rule is prima facie evidence that the rule is contrary to the FLSA. In *Malcolm Pirnie*, for example, the employer deducted a total of slightly over $3,000 from the pay of 24 employees for partial-day absences during a 19-month period. The employees were part of a class of "well-paid professionals," including "engineers, accountants, architects, scientists, supervisors and administrators" earning between $30,000 and $70,000 per year. 949 F.2d at 613. The employer subsequently changed its pay policy and reimbursed the 24 employees for all pay deductions. *After* the employer made such reimbursement, the Department of Labor sued the employer and eventually obtained judgment of over $500,000 in overtime backpay to be distributed to the entire class of professional employees. 821 F.Supp. at 910.[10]

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[10] The original pay deductions in *Malcolm Pirnie*, like those of many private sector employers, were driven by government contracting rules that require contractors to keep meticulous record of time worked by an employee on the government project. *E.g.*, 48 CFR §§ 30.000 *et seq.*; 48 CFR §§ 31.000 *et seq.*; 48 CFR §§ 52.216-6, 52.216-17. The government will pay only for work actually performed. Private sector practices like that at issue in *Malcolm Pirnie* thus are motivated by essentially the same accountability principles

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The employee/plaintiff in *Klein v. Rush-Presbyterian-St. Lukes Med. Ctr.*, 990 F.2d 279 (7th Cir. 1993), a psychiatric nurse, had been suspended at least three times for serious patient safety violations, had been placed on a formal discipline plan for tardiness, and eventually was terminated for job performance and conduct problems. *Id.* at 281-82. Yet she was entitled to two years of overtime backpay because she was once suspended for one day without pay for "being rude, abrupt, and irritable to fellow staff members, as well as an incident with a patient's visitor." *Id.* at 282. The fact that Klein *could have been* suspended for a partial-week period for less than a serious health violation at any time during the two years was sufficient to entitle this disgruntled employee to her revenge against her former employer. *Id.*[11] To impose

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that created such turmoil in the public sector following *Abshire*.

11 Employers also can find themselves in a bind when a court concludes that disciplinary rules that have been collectively bargained, and therefore are not easily changed, run afoul of the salary basis requirements. The court in *McGuire v. City of Portland, Oregon*, 91 F.3d 1293 (9th Cir. 1996), affirmed summary judgment in favor of the overtime claims of former battalion chiefs for the Portland Fire Bureau because the City of Portland had a written disciplinary policy through which battalion chiefs could be suspended for less than a week for various workrule violations, even though no battalion chief had ever suffered such a suspension. *Id.* at 1294-95. The

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liability against the employer in the present case would be no less capricious.

The FLSA mandates a return to a more rational understanding of the salary basis regulations that does not provide unintended overtime windfalls to broad classes of executive, administrative, and professional employees.

III. THE REGULATORY PROHIBITION ON PARTIAL-WEEK SUSPENSION FOR VIOLATION OF WORKPLACE RULES IS IRRATIONAL AND CONTRARY TO THE FLSA

Section 541.118(a)(5) of the salary basis regulations, which is applicable in this case, allows an employer to suspend a salaried employee for a period of less than a week for violation of a workplace rule only if the rule involves a safety standard of major significance. This regulatory provision, like the others under section 541.118(a), was promulgated pursuant to the Department of Labor's authority to define "bona fide executive, administrative, or professional capacity" under the FLSA. According to the petitioners, and to the Department as it

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disciplinary rules at issue had been collectively bargained. When the City attempted to change the rules to avoid FLSA liability, the same plaintiffs sued for violation of the collective bargaining agreement. *Id.* at 1296-97 (Skopil, J., concurring).

presently interprets its regulations, an assistant vice president of a large corporation who is suspended from work without pay for three days for making sexually offensive comments at an office meeting is not paid on a salary basis, and therefore is not an executive or administrative employee exempt from the FLSA.[12] Moreover, the assistant VP and every other executive and administrator in the corporation may lose exempt status and be eligible for overtime backpay, according to the petitioners and the Department of Labor, merely because the corporation has a handbook that prohibits sexually offensive comments in the workplace and *threatens* partial-week suspension for violations of the rule.

Section 541.118(a)(5) creates a further nonsensical rule. The regulation prohibits only suspensions of less than a week; an employer is free to suspend any employee for whole week periods, or terminate the employee, with no threat of loss of exempt status.[13] Thus, pursuant to the regulations, an employer can suspend a salaried employee for one day for violation of a *major* safety rule without loss

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12 *Amici* believe that a proper reading of the salary basis regulations would require only that the employer in such a case pay the employee for the period of the suspension and promise not to suspend the employee again for less than a week. *See supra* 10 & n.4. Even under this scenario, the irrationality of the regulation is obvious.

13 *See* 29 CFR § 541.118(a) (salaried employee "need not be paid for any workweek in which he performs no work").

of exempt status, but must suspend the employee for at least a week or terminate the employee for violation of a *minor* safety or other workplace rule in order to protect the exemption.

There is no rational explanation for these results. An employer's decision to discipline an employee for violation of a workplace rule, and the form that discipline takes, is independent of the basis on which the employee is paid and even further removed from status as an executive, administrative, or professional employee. "How, it might be asked, does the structure of discipline affect the character of employees as hourly or salaried workers?" *Mueller v. Reich*, 54 F.3d 438, 443 (7th Cir. 1995) (Posner, J.), *pet. for cert. pending* (No. 95-586). The only answer the Seventh Circuit could derive is that "if an employer measures out discipline in the form of fractions of a weekly salary, the implication is that the employee is really being paid on an hourly basis." *Id.* The Seventh Circuit found this rationale "pretty feeble." *Id.* Irrational and contrary to the statute are other accurate descriptions.

The petitioners offer an equally preposterous explanation. According to the petitioners, exempt employees may not be disciplined at all: "The exempt are the disciplinarians; those subject to discipline are the non-exempt." Petrs'. Br. at 35. The petitioners thus envision a workplace in which all executive, administrative, and professional employees are free to do as they please, with no actual or threatened discipline from their employer: "the employee which [*sic*] an employer thinks of as potentially needing discipline could never be a true executive, exempt administrator or professional." *Id.* Even the petitioners have a tough time with this absurdity, appearing to concede

within a paragraph of their hassle-free workplace pronouncement that employers may impose on their exempt employees discipline other than partial-week suspensions. *Id.* at 34. But the petitioners offer no explanation why protection against this particular form of discipline should be a benchmark of exempt status.[14]

The Department of Labor has bestowed upon executive, administrative, and professional employees—who are to be exempt from the FLSA—freedom from workplace discipline that is not even enjoyed by the employees the Act is intended to protect. The Department has no such authority under the Act.

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14 The petitioners cite evidence that in 1949 employers rarely imposed disciplinary deductions on executive, administrative, and professional employees. Petrs'. Br. at 34 n.29. No doubt there were many correlates of exempt status in 1949, such as being white and male, but such empirical observation can support a regulation only if, at a minimum, there is some rational connection between the observed fact and executive, administrative, or professional status, or at least a connection with payment on a salaried rather than hourly basis. Disciplinary suspension bears no relation to either.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the Eighth Circuit. The Court should hold: (1) that pay deductions in violation of the salary basis regulations may result in loss of exempt status only for employees whose pay has been docked and only for the weeks during which such deductions occurred; (2) that the window of correction under 29 CFR § 541.118(a)(6) is available when deductions are made inadvertently *or* for reasons other than lack of work; and (3) that the restriction on partial-week suspensions for workplace rule violations under 29 CFR § 541.118(a)(5) is irrational and invalid.

Respectfully submitted,

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QUESTIONS PRESENTED

Under the salary basis test of Section 541.118 of Title 29 of the *Code of Federal Regulations* interpreting the so-called "white-collar exemption" of the *Fair Labor Standards Act* at 29 U.S.C. §213(a)(1), employers whose disciplinary policies subject administrative, professional, and executive employees to unpaid disciplinary suspensions in increments of less than a week must pay overtime at time-and-a-half to all otherwise-exempt employees, not just those subject to such discipline.

1. ***Regulatory validity:*** Does 29 C.F.R. §541.118 validly apply to the public sector, or is the regulation arbitrary and capricious, contrary to sound public policy and basic principles of equality, fairness, and consistency, and contrary to express congressional intent that white-collar employees not be paid overtime?

2. ***Constitutionality:*** Does 29 C.F.R. §541.118 validly apply to the public sector, or does it violate the rights of States and their political subdivisions under the Tenth Amendment of the United States Constitution?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

STATEMENT OF INTEREST 1

PROLOGUE: "What's a public employer to do?" 3

SUMMARY OF ARGUMENT 13
I. The Regulation Is Invalid 13
II. The Regulation Is Unconstitutional 13

ARGUMENT 14
Introduction 14

I. THE JUDICIAL BRANCH OWES NO DEFERENCE TO AN EXECUTIVE BRANCH REGULATION THAT IS ARBITRARY AND CAPRICIOUS AND CONTRARY TO THE EXPRESS INTENT OF CONGRESS; AND IS, IN FACT, COMPELLED BY THE ADMINISTRATIVE PROCEDURE ACT TO INVALIDATE IT 17

A. The regulation is completely at odds with principles of equality, consistency, and fairness, if not public accountability — particularly affecting the public sector — which the Department of Labor has failed to take into consideration since at least 1992 18

Page

B. The entire salary basis test, including its disciplinary component, is contrary to express congressional intent that white-collar employees not be paid overtime. 23

C. The salary basis test is arbitrary and capricious and contrary to sound public policy. 26

II. THE REGULATION VIOLATES STATES' RIGHTS UNDER THE TENTH AMENDMENT OF THE UNITED STATES CONSTITUTION. 28

CONCLUSION 30

APPENDIX OF NINTH CIRCUIT CASES CURRENTLY PENDING REGARDING THE VALIDITY OF 29 C.F.R. §541.118(a)(5) ix

TABLE OF AUTHORITIES

Caselaw

FEDERAL CASES — Page

Abshire v. County of Kern, 908 F.2d 483 (9th Cir. 1990), *cert. denied* (1991), 498 U.S. 1068, 111 S.Ct. 785, 112 L.Ed.2d 848 ..... 4, 22

Auer v. Robbins, 65 F.3d 702 (8th Cir. 1995), *cert. granted* (U.S. No. 95-897 Jun. 24,1996) 2, 10, 14, 16

Balgowan v. New Jersey Dept. of Transportation, 84 F. 3d 656 (3d Cir., May 16, 1996); *op. withdrawn & vacated; rhr'g pet. granted,* 84. F. 3d 667 (July 9, 1996), *pending hr'g* 14, 16

Block v. Los Angeles Dept. of Water and Power, D.C. Case No. CV 91-5461-JGD(Tx), 9th Cir. U.S.C.A. Case No. 94-56135, consolidated with 94-56421 and 95-55345 ..... 2, ix

Carpenter v. City & County of Denver, 82 F. 3d 353 (10th Cir., Apr. 23, 1996), *rhr'g pet. denied* (May 21, 1996) *cert. pending* (U.S. No. 95-2088, filed 6-28-96) 14

Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 81 L.Ed.2d 694, 104 S.Ct. 2778 (1984) 18

Garcia v. San Antonio Metropolitan Transit Authority 469 U.S. 528, 105 S.Ct. 1005, 83 L.Ed.2d 1016 (1985) 4, 28, 29

FEDERAL CASES - Continued — Page

Harding v. City of Los Angeles, D.C. Case No. CV 94-00916-JGD(Tx), 9th Cir. U.S.C.A. Case No. 96-55286 ..... 2, ix

Hernandez v. City of Santa Ana, U.S.C.A. Case No. 93-56624, 1996 WL 454519 (9th Cir August 12, 1996) 16

Higuera v. City of Los Angeles and Dept. of Water and Power, D.C. Case No. CV 93-2527-JGD(Tx), 9th Cir. U.S.C.A. Case Nos. 96-55325, 96-55418, 96-55419, 96-55840, 96-55841, and 96-55844 ..... 2, ix

Hilbert v. District of Columbia, 23 F.3d 429 (D.C.Cir. 1994) 20

Huey v. Honeywell, 82 F.3d 327 (9th Cir. 1996) 26

McGuire v. City of Portland, Oregon, 91 F.3d 1293 (9th Cir., August 2, 1996), *action on rhr'g pet. deferred, pending Supreme Court's decision in Auer v. Robbins, Supra* 14, 16

Morsch v. City of Los Angeles, D.C. Case No. 91-00401-JGD(Tx), 9th Cir. U.S.C.A. Case No. 94-56701 ..... 2, ix

FEDERAL CASES - Continued Page

Mueller v. Reich, 54 F.3d 438 (7th Cir. 1995) *rhr'g and en banc pet. denied* (July 12, 1995); *cert. pending sub nom. Wisconsin v. Mueller* (U.S. No. 95-586, filed October 10, 1995 14

Rusk v. Los Angeles Dept. of Water and Power D.C. Case No. CV 92-7316-JGD(Tx) 2

Service Employees International Union, Local 102 v. County of San Diego, 35 F. 3d 483 (9th Cir. 1994), *en banc and rhr'g denied, supp. op.* 60 F. 3d 1346 (9th Cir. 1995), *cert. denied,* __U.S.__, 133 L.Ed.2d 726, 116 S.Ct. 774 (Jan. 16, 1996), referred to throughout the brief as *"SEIU."* ..... *passim*

Spradling v. City of Tulsa, Oklahoma, __F.3d__, 1996 WL 518438 (10th Cir., Sept. 13, 1996) 14

Stanley v. City of Tracy, 9th Cir. U.S.C.A. Case No. 95-16242 ix

Yourman v. Dinkins, 84 F.3d 655 (2d Cir. 1996), *cert. pending sub. nom. Giuliani v. Yourman* (U.S. No. 96-152, filed 7-29-96) 14

STATE CASES

Skelly v. State Personnel Board, 15 Cal.3d 194, 124 Cal.Rptr. 14, 539 P.2d 774 (CA Supm. Ct. 1975) 19

Statutory Materials

FEDERAL CONSTITUTION

Tenth Amendment..... i, 4, 28, 29

FEDERAL STATUTES

5 U.S.C. §706, *"Administrative Procedure Act"* 13, 17
Fair Labor Standards Act," FLSA, or "the Act," ..... *passim*
29 U.S.C. §202 28
29 U.S.C. §207(a)(1) 24
29 U.S.C. §213(a)(1) ..... i, 23, 24
29 U.S.C. §216(b) 5
Title VII (42 U.S.C. §§2000(e), *et seq.* 7, 18

FEDERAL SESSION LAWS

Pub. L. 101-583, 104 Stat. 2871 (Nov. 15, 1990). 28
Pub. L. 99-150; 99 Stat. 790 (1985). 23
Pub. L. 93-259, 88 Stat. 55, 59-63 (1974) 4

STATE CONSTITUTION

California Constitution, Article XI, Section 10 20

STATE STATUTES

California Fair Employment and Housing Act, Government Code §§12900, *et seq.* 7

LOCAL ORDINANCES

Los Angeles City Administrative Code §§4.28 and 4.29 18

FEDERAL REGULATIONS — Page

5 C.F.R. §§551.203-206 27
Title 29, Code of Federal Regulations 21
Part 541 21
29 C.F.R. §541.5d ..... *passim*
29 C.F.R. §541.118 ..... *passim*
29 C.F.R. §541.118(a) 15, 20
29 C.F.R. §541.118(a)(1) 26
29 C.F.R. §541.118(a)(2) 15
29 C.F.R. §541.118(a)(5) ..... *passim*
29 C.F.R. §541.118(a)(1)-(6) 15, 24
29 C.F.R. §541.118(b) 15
29 C.F.R. §541.118(c) 15
29 C.F.R. §541.312 ..... 27, 28
29 C.F.R. §541.314 27

FEDERAL REGISTER
52 Fed.Reg. 2032 (1987) 22
57 Fed.Reg. 37666 ..... 12, 21
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Other Materials

CONGRESSIONAL COMMITTEE HEARINGS
Serial No. 102-122, transcript pages 32-37
(September 16, 1992) 22, 29

FEDERAL RULES
Supreme Court Rule 37(4) 1
Ninth Circuit Rule 36-3 17

No. 95-897

In the

Supreme Court of the United States

October Term, 1996

FRANCIS BERNARD AUER, et al.,
Petitioners,

v.

DAVID A. ROBBINS, et al.,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

BRIEF OF THE DEPARTMENT OF WATER AND POWER OF THE CITY OF LOS ANGELES AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

STATEMENT OF INTEREST

The Department of Water and Power (DWP) is the largest municipally-owned utility in the nation, and the largest proprietary department of the City of Los Angeles, with independent power to sue and be sued in its own name. It therefore files this *amicus* brief without leave or consent, as permitted by Supreme Court Rule 37(4).

DWP currently has 9,367 employees, 735 of whom are classified as white-collar-exempt under the *Fair Labor Standards Act* ("FLSA"). DWP, like the cities of St. Louis and Los Angeles, like so many other public employers, has in place a discretionary disciplinary policy that permits, but

does not require, unpaid disciplinary suspensions in increments of less than a week for violations of rules not involving major safety violations. This disciplinary policy naturally applies to all employees, FLSA-exempt and non-exempt alike.

Of the 735 exempt employees at DWP, 262 have filed three separate lawsuits so far,[1] claiming overtime at time-and-a-half based on the disciplinary component of 29 C.F.R. §541.118, on the same theory as Petitioners before this Court. Two of those lawsuits are currently pending before the Ninth Circuit, and the third one is still in the District Court. The total liability exposure on these cases is calculated at close to ten million dollars for DWP alone.

After losing on liability below in *Higuera* and *Block*, DWP is appealing the regulatory and constitutional validity of 29 C.F.R. §541.118 as applied to the public sector. These statutory construction and constitutional validity arguments, heard by the Ninth Circuit in *Block* on March 6, 1996,[2] and partially briefed in *Higuera* as of October 1, 1996,[3] have not

[1] *Wayne Block, et al. v. Los Angeles Dept. of Water and Power*, D.C. Case No. CV 91-5461-JGD (Tx), 9th Cir. U.S.C.A. Case No. 94-56135, consolidated with 94-56421 and 95-55345; *Higuera vs. City of Los Angeles and Dept. of Water and Power*, CV 93-2527-JGD (Tx), U.S.C.A. Case Nos. 96-55325, 96-55418, 96-55419, 96-55840, 96-55841, and 96-55844; and *Rusk vs. Los Angeles Dept. of Water and Power*, CV 92-7316-JGD (Tx). Additionally, *Morsch v. City of Los Angeles*, No. CV 91-00401-JGD (Tx), U.S.C.A. No. 94-56701, and *Harding v. City of Los Angeles*, CV 94-00916-JGD (Tx), U.S.C.A. No. 96-55286 are currently pending in the Ninth Circuit against the City of Los Angeles, which is represented by different counsel.

[2] Per Ninth Circuit Order filed October 2, 1996, submission was vacated pending Supreme Court disposition in *Auer v. Robbins herein*..

[3] DWP's Opening Brief filed in the Ninth Circuit this date.

yet been ruled upon; they are repeated and expanded upon here in the hope that they will assist and persuade this Court to settle an issue of paramount public importance, involving not just the high financial stakes to the litigants, but the very core principles of equality, federalism, and separation of powers upon which this country was founded.

A final pronouncement from this Court on the more fundamental validity question — raised but not briefed by Petitioners—will not only be dispositive of the "subject to" and window of correction" questions presented, but also — and more importantly to the administration of justice — will help resolve countless public sector lawsuits pending regarding the salary test,[4] that are dividing so many federal courts across the land, and that are steadily making their way up to this Court.

PROLOGUE

"What's a public employer to do?"

The following scenario is partly fictional, but illustrative of the predicament of so many public sector employers in this and related litigation across the nation. Imagine the scene as the City Council Chambers of Anytown, U.S.A. Present are the Mayor, the City Attorney, and the Paymaster.

[4] According to 1995-1996 statistics provided by the Administrative Office of the U.S. Courts, 1,374 federal-question *FLSA* cases were pending in the U.S. District Courts as of March 31, 1996. It is uncertain how many of these involve public sector defendants or the disciplinary component.

Mayor: Madam City Attorney, would you please brief me on the status of this FLSA litigation, because I am not at all sure that any of it makes any sense to me.

City Attorney: You are not alone in your frustration, sir. It all started in 1974, when Congress made the FLSA applicable to public employers[5] and the Supreme Court held in 1985 that this did not violate States' rights under the Tenth Amendment of the U.S. Constitution.[6] In the seminal case of *Abshire v. County of Kern,*[7] the Ninth Circuit decided in 1990 that the theoretical possibility of deductions of a day or less pursuant to an express policy — even if no actual deductions had occurred — rendered a public employee non-salaried. This made virtually all public employers liable for overtime at time-and-a-half for its highest paid employees and, consequently, in 1992, the U.S. Department of Labor reversed its position on this issue, creating a regulatory exception for partial-day docking by public employers with public accountability ordinances requiring that leaves of a day or less be without pay,[8] and *Abshire* was, in effect, overruled in the public sector.

Creative lawyers for public employees soon found another theory to sue under, however, in the disciplinary

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[5] Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, §88 Stat. 55, 59-63.

[6] *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 105 S.Ct. 1005, 83 L.Ed.2d 1016 (1985).

[7] *Abshire v. County of Kern*, 908 F.2d 483 (9th Cir. 1990), *cert. denied*, 498 U.S. 1068, 111 S.C.t 785, 112 L.Ed.2d 848 (1991).

[8] 29 C.F.R. §541.5d.

component of the regulation,[9] which to this day the Secretary of Labor has failed to amend, despite repeated requests from the public sector for reasons similar to those that generated the public accountability exception for partial-day docking.

Mayor: Yes, and as I understand it, our current troubles arise because we have a disciplinary policy in place that subjects executive, managerial, and professional employees to discipline in increments of less than a week for infractions not involving major safety rules, and now all those otherwise FLSA-exempt employees, not just those actually disciplined, are claiming to be wage-earners under the regulation, and are demanding that we pay them overtime at time-and-a-half because of it, is that right?

City Attorney: Exactly. And that translates into —

Paymaster: — 200 employees with an average of 100 hours of accumulated overtime, making a minimum of $30/hr — or $45/hr at time-and-a-half — in sum, $900,000 in overtime that we would not otherwise pay.

City Attorney: Plus statutorily-imposed liquidated damages that double or treble that liability into the seven figures; and don't forget close to a hundred thousand dollars in plaintiffs' attorneys' fees, interest, and costs.[10] And that, of course, does not take into account our own legal fees and costs in defending these cases, which are not recoverable, even if we win.

Paymaster: I can only imagine the potential liability of a city the size of, say, Los Angeles, with 40,000 employees

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[9] 29 C.F.R. §541.118(a)(5).

[10] Pursuant to 29 U.S.C. §216(b.

and all that accrued overtime due to floods, earthquakes, and riots in the last few years. . . ! Lawsuits like these could bankrupt many a city, county or even some states, especially in these times of tight fiscal budgets! And all because we are trying to be accountable to the public we serve, and have sensible disciplinary guidelines that are enforced consistently across the board!

Mayor: Now, wait a minute, you mean to tell me that the taxpayers of this City are going to be liable for that kind of money all because we have a disciplinary policy in place that in our case has never actually been imposed?!

Paymaster: That's right! I've done a thorough check of our payroll records, and there have been no actual disciplinary suspensions without pay imposed in our city upon employees classified as FLSA-exempt during the time period applicable to this litigation.

Mayor: Now that's crazy. That can't be right. I mean, not that no actual suspensions have been imposed, of course, but that we could be liable for this exorbitant amount of money because of it.

City Attorney: Well, that's part of what we are arguing in court. But there's more. Assume, for the sake of argument that one of these highly paid managers has been accused of uttering a racial slur and a second one is claimed to have made a sexually-offensive comment. Investigation reveals that the charges are substantiated, and that aggravating and mitigating circumstances are such that an oral reprimand is not enough, and more than a week is too harsh a penalty. Reassignment is neither warranted nor practical. The appropriate amount of discipline recommended by the disciplinary policy manual is a two-day suspension for the

first manager, and three days for the second one. The rules being violated do not involve major safety, so if we take the two and three days out of the managers' pay, we lose the white-collar exemption, not just for those two managers, mind you, but for every other FLSA-exempt employee in the City, as well. So we end up paying all of our employees overtime at time-and-a half. If what the managers had done, instead, was to smoke a cigarette or leave the engine on while pumping gas in our fleet garage, we could give them an unpaid disciplinary suspension for less than a week and not lose the exemption.

Mayor: Now that can't be. What else could we do but discipline them as recommended by the disciplinary guidelines for violations of Title VII[11] or the state anti-discrimination and harassment laws?[12] I know that these infractions don't involve life or death consequences, but they do impinge on basic human dignity! The U.S. Secretary of Labor, of all people, should be the last to suggest, through his regulations, that violations of other federal and state labor laws not involving major safety violations are somehow less important, and least of all should be encouraging their violation by penalizing employers — both public and private, for enforcing them fairly by meting out appropriate and consistent discipline to offending employees! Plus, doesn't this application of the salary test contradict the white-collar exemption? Because all of these exempt employees are unquestionably white-collar professional, managers, and executives under the "duties test," aren't they?

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[11] 42 U.S.C. §§2000(e), *et seq.*

[12] *See, eg.,* California's *Fair Employment and Housing Act, Government Code* §12900, *et seq.*.

Paymaster: Yes, and most of them make between $60,000 and $100,000 a year; these are no sweatshop workers. . .!

Mayor: Nevertheless, under the regulations as they stand right now, and as they have been interpreted by the courts thus far, we have to give the offending managers in our hypothetical case an excessive unpaid suspension of more than a week in order to preserve the overtime exemption, but in doing so we violate our disciplinary guidelines?

City Attorney: Not to mention the City Charter, which not only empowers the City with the right to discipline a misbehaving employee, but also allows a monetary claim by anyone claiming to have been inappropriately disciplined. Plus it exposes us to disparate-treatment discrimination lawsuits regardless of the sex or race of the manager, since an employer is supposed to discipline consistently across the board, irrespective of the FLSA-exempt status of the employee. And although sex or race was not the reason behind our decision, some disgruntled employee will undoubtedly find some unscrupulous lawyer willing to bring a case in the hope of a settlement, and we will have no choice but to defend it regardless of its actual lack of factual or legal merit.

Mayor: It is inconceivable to me that these FLSA plaintiffs are actually asking the courts to uphold a regulation that forces their employer to discipline them more harshly than necessary, and discourages fair and appropriate discipline. That doesn't make any sense, particularly in the public sector. But then again, because of the disparate treatment problem, they probably figure that what we will do is not discipline them at all, and that suits them just fine.

Can they and the Secretary of Labor seriously be arguing that because they are executive, professional, and managerial employees they cannot be disciplined in increments of less than a week, or if they are, that we must pay them for overtime at time-and-a-half? Why can we discipline them only in full-week increments and dock them for a day or less without losing the exemption, yet if we discipline them for three days or for eleven days we have to pay them overtime at premium rate? This makes absolutely no sense whatsoever!

Paymaster: It also creates other problems in practice. Say we do give them a disciplinary suspension without pay for more than a week. Besides not being fair to the employees being disciplined because they only deserved a two or three-day suspension, it is also not fair to their subordinates, who on top of being offended by the racial slur or the sexist comment, probably have to pick up the slack for the offending manager during the unnecessary extra days that they are absent under the harsher suspension period required by the regulation. This can in turn result in extra overtime by these subordinates or coworkers, who, if wage earners get overtime at time-and-a-half, and if FLSA-exempt are going to claim it anyway. And remember, the rule exposes us to overtime claims at time-and-a-half not just for the suspended employee but for every other exempt employee on the payroll!

Mayor: And the public fisc is the one losing the most in the end, because it either pays overtime to the misbehaving employee, risks losing employee morale and public confidence if it does not discipline or disciplines without loss of pay, or if it disciplines excessively and pays unnecessary overtime to subordinates picking up the slack! So what's a public employer to do?

City Attorney: Well, we are vigorously defending these lawsuits in the federal courts across the nation, but at a very hefty legal cost. We are very hopeful, especially now that the Supreme Court has agreed to review the Eighth Circuit's decision in *Auer vs. Robbins* that the validity of the regulation will be decided on either statutory or constitutional principles, or both. We view this as the only way of putting an end to the endless barrage of public-sector FLSA litigation on this and other issues across the nation.

Paymaster: Yes, but how do you like the "about face" of the Department of Labor in its *amicus* brief opposing the granting of review by the Supreme Court in that case? In a desperate, last-minute effort to save the regulation from being invalidated, they are now saying that the regulation should stand because their newly-announced interpretation does not unduly burden the public sector.

Mayor: How's that?

City Attorney: Yes, in a surprise announcement in May of this year, in an *amicus* brief filed at the request of the Supreme Court in the *Auer* case, the Secretary of Labor, despite many previous requests for accommodation from numerous representatives of the public sector since at least 1992, finally announced to the courts that "subject to" means the actual imposition — as opposed to the theoretical possibility — of unpaid deductions, and that the white-collar exemption is not lost for "isolated deductions" or disciplinary suspensions imposed under "unusual circumstances," pursuant to discretionary disciplinary policies that permit but do not require them,[13] because, and contrary to their earlier

[13] *See* pp. 9-10 of Dep't of Labor's Brief opposing review in this case.

position, an employer may avail itself of the "window of correction" reprieve from the exemption in isolated cases, even where the deduction is clearly in violation of the regulation.[14]

Paymaster: Even assuming that the High Court were to pay any heed to this last-minute, self-serving interpretation, this of course creates more problems than it solves, doesn't it?

City Attorney: It sure does. If courts across the country have been handing down widely differing opinions interpreting "subject to" and the difference between the "docking" and the "disciplinary" components of the regulation, imagine how many more different, conflicting, "slippery slope" decisions we will now get on the meaning of "unusual circumstances" or what constitute "isolated" incidents of disciplinary suspension, or what is a reasonable period of time for an employer to avail itself of the window of correction, *etcetera*. Plus, even this interpretation of the regulation still treats similarly situated employers — and employees — differently, solely because of the number of employees that are being disciplined. And because of this, in effect, it reinforces the incentive under the regulation for employers to under- or over-discipline employees, which is unacceptable in the public sector due to the need to account to the public and other employees not just for the time that public servants are on the job, but also — and more importantly — for their good conduct while they are at work.

Mayor: So, again, I ask you, what's a public employer to do?

[14] Department of Labor's Brief opposing review in this case, at p.16.

City Attorney: Pray and hope that the Courts of Appeal or the Supreme Court will see the wisdom of the public sector arguments as the only way to put an end to all this confusing, costly, and time-consuming litigation once and for all, which is sure to continue into the future on other, yet untested theories under the regulation, such as deductions for witness or jury duty and military leave, that have started to come up in some recent cases. Our efforts to lobby Congress for a legislative amendment, or the Department of Labor for a regulatory exception, to the disciplinary component have certainly fallen on deaf ears.[15]

Mayor: I wish you luck, Madam City Attorney. Please keep me posted on a regular basis.

City Attorney: Thank you, sir. We will give it our best shot. I am confident that reason will ultimately prevail.

Mayor: In the meantime, Mr. Paymaster, pending further notice, please make sure that absolutely none of these highly-paid employees are disciplined in increments of less than a week under any circumstances — I can't believe I'm saying this! — even if that violates every principle of equality, public accountability and common sense that I can think of, and exposes us to all of these other problems that we have been discussing. The City Attorney will work with my Office in reducing this policy to writing and circulating it to all managers throughout the City for immediate implementation, pending further legal developments.

Paymaster: Will do, sir. Hopefully we will have a favorable decision soon.

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[15] *See, eg., fns.* 21 and 22 at p. 27 of Petitioners' Brief, and 57 *Fed. Reg.* 37666, at 37674 (August 19 , 1992).

SUMMARY OF ARGUMENT

I. THE REGULATION IS INVALID

The judiciary owes no deference to an executive regulation that is arbitrary and capricious and contrary to express congressional intent; and is, in fact, compelled by the Administrative Procedure Act to invalidate it. The salary basis test is invalid for the following reasons:

A. Its disciplinary component is completely at odds with principles of equality, consistency and fairness — if not public accountability — particularly affecting the public sector, which the Department of Labor failed to take into consideration when it promulgated the regulation, thereafter, and to this day.

B. The entire salary basis test itself is contrary to express congressional intent that white-collar employees not be paid overtime, in that it is solely a creation of the Department of Labor who, by its piecemeal retreat from it — such as the disciplinary regulatory exception of 29 C.F.R. §541.118(a)(5) — implicitly concedes this contradiction.

C. The regulation as a whole is arbitrary and capricious and contrary to sound public policy because it makes no sense from anyone's perspective.

II. THE REGULATION IS UNCONSTITUTIONAL

29 C.F.R. §541.118 violates the rights of States and their political subdivisions to discipline its employees in that the political process to change the regulation to take into consideration unique public sector problems, has failed, despite many years of trying.

ARGUMENT

Introduction

With the possible exception of this case, every court considering the validity of the disciplinary component of the salary basis test to date has upheld it.[16] Yet none has apparently fully considered the true real-life implications and devastating consequences, best articulated in the *Prologue*, that public employers must grapple with in a good-faith attempt to comply with the regulation.

Only one court in the entire nation has had the courage to invalidate the *entire* salary basis test of 29 C.F.R. §541.118 as contrary to the intent of Congress regarding the public sector: the Ninth Circuit in *Service Employees International Union, Local 102 v. County of San Diego.*[17]

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[16] *Mueller v. Reich,*, 54 F.3d 438 (7th Cir. 1995) *rehr'g. and en banc pet. denied; cert. pet. pending sub. nom. Wisconsin v. Mueller* (U.S. No. 95-586, filed Oct. 10, 1995); *Carpenter v. City & County of Denver, Colorado*, 82 F.3d 353 (10th Cir., Apr. 23, 1996), *rhr'g pet. denied, cert. pet. pending* (U.S. No. 95-2088, filed 6-28-96); *Balgowan v. New Jersey Dept. of Transportation*, 84 F. 3d 656 (3rd Cir., May 16, 1996), *op. withdrawn and vacated; rhr'g pet. granted*, 84 F.3d 667, pending hr'g; *Yourman v. Dinkins*, 84 F.3d 655 (2d Cir., May 31, 1996), *cert. pet. pending sub. nom. Giuliani v. Yourman* (U.S. No. 96-152, filed 7-29-96); *McGuire v. City of Portland, Oregon*, 91 F.3d 1293 (9th Cir., August 2, 1996), decision on *rhr'g pet. deferred, pending Supreme Court's decision in Auer v. Robbins herein; Spradling v. City of Tulsa, Oklahoma*, __F.3d__, 1996 WL 518438 (10th Cir., Sept. 13, 1996). Only the Eighth Circuit below "assume(d), without deciding that the regulation validly applies to public sector employees." *Auer*, 65 F.3d 702, at 710, fn.6.

[17] *Service Employees International Union, Local 102 v. County of San Diego*, 35 F.3d 483 (9th Cir. 1994), *en banc and rhr'g denied, supp. op.* 60 F. 3d 1346 (9th Cir. 1995), *cert. denied*, __U.S.__, 133 L.Ed.2d 726, 116 S.Ct. 774 (Jan. 16, 1996), hereinafter referred to as "*SEIU.*"

In so doing, that court based its decision on the Labor Department's own reasoning that most public employers could not comply with the regulation due to public accountability principles, thereby depriving them of the white-collar exemption intended by Congress to apply in the public sector, solely for that reason.

Although *SEIU* (decided in 1994 and supplemented in 1995) was a partial-day docking case, its express invalidation of *each and every* subsection of the salary basis test "in its entirety" is *not dictum,* because to reconcile the partial-day docking exception of 29 C.F.R. §541.5d with the personal-leave exception of 29 C.F.R. §541.118(a)(2) that precluded it only by negative implication, that court *had to* — under the separation of powers doctrine — invalidate the entire salary test, and not just the partial-day docking component before it:

> "Because the test's basic infirmity lies in its definition of what it means to be paid on a 'salary basis', *see* 29 C.F.R. §541.118(a), salvaging those contingent aspects of the regulation that qualify and provide exceptions, see 29 C.F.R. § 541.118(a)(1)-(6), (b), (c) is inappropriate. To do so would be tantamount to rulemaking, a power with which we are not invested."[18]

And it was this cornerstone principle of American government, rather than any possible misinterpretation of the scope of the Labor Department's non-enforcement policy — the Ninth Circuit believed that it applied to the entire salary test and the Labor Department claims it applied only to the partial-day docking rule — that propelled the largest circuit court in the nation to invalidate the entire salary test, and to

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[18] *SEIU, supra*, at 1354 (emphasis added).

uphold only the validity of 29 C.F.R. §541.5d before it, a different regulation not at issue here.

SEIU therefore *expressly* invalidated the disciplinary component of §541.118(a)(5), specifically including that subsection in the text of its opinion. What is now left of the salary basis test, at least in the Ninth Circuit — 29 C.F.R. §541.5d — *does not mention the disciplinary component,* and the Department of Labor has not amended 29 C.F.R. §541.118 or come up with a new salary-basis regulation even after *SEIU* reiterated its total invalidity in its 1995 supplemental decision, and despite knowledge that the disciplinary component of the regulation was causing a great deal of problems in the public sector.[19]

McGuire vs. City of Portland, contra, supra at *fn.* 16, relied on *Balgowan, accord, supra* at *fn.* 16 — which has been withdrawn and vacated pending rehearing — and involved, in any event, evidence of at least *fifteen* actual disciplinary deductions from non-litigant employees in plaintiffs' classifications. Action on the rehearing petition in *Mcguire* has been deferred pending this Court's decision in *Auer*, and the case is therefore of questionable authority. And *Hernandez v. City of Santa Ana*, U.S.C.A. No. 93-56624, 1996 WL454519 (9th Cir. Aug. 12, 1996) cited at p.31

[19] *See, eg.*, 61 *Fed.Reg.* 23239-23240 (May 13, 1996), the most recent of frequent regulatory agendas issued by the Department of Labor in recent years proposing to review all aspects of the salary basis regulations, admitting that previous revisions of the regulations were "limited" in nature, and that the regulations are still in need of updating and clarification, particularly with regards to what constitutes a "salary basis," and acknowledging that in the public sector, in particular, recent court ruling have created "massive confusion and "progressive loss of control of the guiding interpretations under this exemption, . . . creating law without considering a comprehensive analytical approach to current compensation concepts and workplace practices."

fn. 26 of Petitioners' Brief, is an unpublished decision that may not be cited, except as allowed by Ninth Circuit Rule 36-3 not applicable here.

All cases upholding the validity of 29 C.F.R. §541.118(a)(5) seem to have rejected the reasoning of *SEIU* based on two misconceptions: (1) that the Department of Labor has not amended the salary basis test because it has duly *considered* public sector concerns and determined them to be unavailing; and (2) that public employers are at liberty to simply amend their disciplinary policies to comply with the regulation, or that they should have to. As developed below, none could be further from the truth.

I. THE JUDICIAL BRANCH OWES NO DEFERENCE TO AN EXECUTIVE BRANCH REGULATION THAT IS ARBITRARY AND CAPRICIOUS AND CONTRARY TO THE EXPRESS INTENT OF CONGRESS; AND IS, IN FACT, COMPELLED BY THE ADMINISTRATIVE PROCEDURE ACT TO INVALIDATE IT.

Judicial review of arbitrary and capricious — or unconstitutional — federal agency regulations is mandated by 5 U.S.C. §706:

> "The reviewing court ***shall*** —
> (1) compel agency action unlawfully withheld or unreasonably delayed; and
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be —
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
> (B) contrary to constitutional right, power, privilege, or immunity."[20]

[20] 5 U.S.C. §706 (emphasis added).

Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 81 L.Ed.2d 694, 104 S.Ct. 2778 (1984) is not to the contrary: "The Judiciary is the final authority on issues of statutory construction which are contrary to clear congressional intent." 467 U.S., at 843, *n.*9 (citations omitted). Based on this, *SEIU, supra,* at 1358-59, "declined the "wondrous and strange offer" to defer to the Labor Department's "failure to discharge its responsibilities under the law and to apply in a pending lawsuit a regulation that is manifestly inappropriate." This *amicus* asks *this* Court to do the same here.

A. The disciplinary component of the regulation is completely at odds with principles of equality, consistency, and fairness, if not public accountability — particularly affecting the public sector — which the Department of Labor has failed to take into consideration since at least 1992.

Public employers, like all employers, have an inherent right to discipline their employees. But they also have a duty — under laws such as Title VII, state anti-discrimination laws, and a myriad other social and public accountability statutes and ordinances — to do so consistently and fairly. The Department of Water and Power, for example, is liable by local ordinance, as is the City of Los Angeles, to anyone who claims to have been disciplined inappropriately.[21] This local ordinance is not taken into account by 29 C.F.R. §541.118(a)(5).

[21] *See, eg., Administrative Code of the City of Los Angeles,* § 4.28 and 4.29.

The disciplinary component of the regulation, in effect, compels disparate disciplinary treatment of employees solely because of their FLSA-exempt or non-exempt status. And like the partial-day docking component of the regulation previously invalidated by the Ninth Circuit, the disciplinary component is invalid as contrary to express congressional intent, because it deprives public employers of the white-collar exemption that Congress intended them to enjoy, *solely* because of a disciplinary policy that treats otherwise similarly-situated employees consistently and fairly. In short, it violates another basic principle upon which this country was founded: equality, in the sense of fair and consistent treatment under the law.

The "broad array" of disciplinary means available to public entities alluded to by previous court decisions is illusory and typically non-existent. Unlike in the private sector, where an offending employee is simply fired or very harshly disciplined, the need for progressive discipline in the public sector, starting with oral warnings, and progressing through reassignment and low-level disciplinary suspensions in increments of less than a week, is essential. Public sector employers must carefully navigate through constitutionally-mandated due process procedures[22] and equal protection limitations, state-law imposed duties to bargain collectively in good faith regarding changes in disciplinary guidelines, strict procedural and substantive limitations imposed by civil service rules adopted by local ordinances, and state

[22] *See, Skelly v. State Personnel Board*, 15 Cal. 3d 194, 124 Cal. Rptr. 14, 539 P.2d 774 (CA Supm. Ct. 1975), (holding that permanent California public sector employees protected by a statutory civil service scheme have a property interest in continued public employment that requires that they be given notice of the proposed disciplinary action, be apprised of the reasons therefor, and be provided a copy of the charges and an opportunity to respond).

constitutional prohibitions against retroactive payment of overtime,[23] that are simply not applicable in the private sector.

Moreover, deductions from pay are the most likely to get a deviant employee's attention, and the regulation irrationally prohibits only disciplinary deduction in *less than full week increments*, not just those less than a week, full-week deductions being allowed by the last sentence of 29 C.F.R. §541.118(a): "employee need not be paid for any workweek in which he performs no work."

But in the end, the overriding principle is equality: no public servant, no matter how high up, can or should be above a particular level of discipline. He or she — like every other public employee — has to be "subject to" discipline for misconduct, whether imposed or not.[24] Government cannot be consistently accountable otherwise. To suggest, as Petitioners do at p. 35 of their brief, that high-level employees can commit no wrong, or at least not merit discipline of a particular kind, is ludicrous; it is precisely at the highest levels of the American work force that wrongdoing needs to be addressed appropriately, because it is there that it can have its greatest impact, by way of example, on all other employees and the public at large, particularly in the public sector, where not just taxpayers' dollars, but the public's trust, are at stake. And a regulation that converts an administrator, an executive, or a professional into a wage earner *solely* because his employer reserves the

[23] *See, eg., California Constitution,* Article XI, Section 10.

[24] *Cf. Hilbert v. District of Columbia* 23 F.3d 429 (D.C. Cir. 1994), a badly divided opinion in which Judge Henderson, at p. 435 of her concurring and dissenting opinion, made a similar argument with regards to docking for partial-day absences.

right to discipline him for misconduct in a certain way, defies reason and should not be upheld under our system of laws.

And it defies reason because deductions from pay are not what make a public employee non-salaried: the Labor Department has already acknowledged this much by conceding in 29 C.F.R. §541.5d that a public employee's salary may be docked for partial-day absences and not lose exempt salaried status. To repeat the Ninth Circuit's wise pronouncement in *SEIU,* "the test's basic infirmity lies in what it means to be paid on a 'salary basis.' "[25] The salary test is totally unnecessary because the duties test already accounts for the essence of the white-collar exemption.

Within and without the Ninth Circuit, every court that has found the disciplinary component to be valid, has not considered these novel arguments, and is also apparently under the misapprehension that the Department of Labor has considered the problems raised by the disciplinary component of the regulation and decided to retain it without further exception for the public sector. This is simply not the case. At 57 *Fed.Reg.* 37666, specifically page 37674, the Labor Department replied to the numerous comments from various state, county, and local government representatives in August of 1992, that Section 541.118(a)(5) was not then open for comment; "however, the Department expects to consider this issue as appropriate in proposed revisions of Part 541 at a later date."

And at congressional hearings held a month later before the House Subcommittee on Labor Standards regarding the retroactivity of 29 C.F.R §541.5d, numerous representatives of the public sector once again begged Congress and the

[25] *SEIU, supra,* at 1354.

Labor Department to address the disciplinary issue. Under the excuse that the issue was still not open for comment, the Labor Department adeptly evaded pointed congressional inquiry on the topic, and *declined to consider* the question, deferring consideration of the disciplinary component, and the public sector's special problems with it, to another day.[26] No public comments were, of course, received regarding the salary basis test in response to the 1985-1986 Department of Labor request for comments, because *Abshire* (1990) *supra*, had not yet come down, and no one had yet ideated the partial-day docking — let alone the disciplinary component — theories of recovery, and the 1985-1986 comment period had closed in 1987, as pointed out at page 30 of Petitioners' Brief.[27]

The dearth of any disciplinary violation cases currently being enforced by the Labor Department suggests at least an unofficial non-enforcement policy regarding this aspect of the salary basis regulation. And despite issuing frequent regulatory agendas reiterating the serious economic impact of the regulation, most recently on May 13, 1996,[28] the fact remains that the salary basis regulation has not been amended. This is precisely the same type of Executive Branch inaction of which the Ninth Circuit Court was so critical in its supplemental decision in *SEIU*, and which constituted the second, and most important, pillar of its reasoning.

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[26] *See*, pages 32-37 of the official transcript of a hearing held in Washington, D.C., on September 16, 1996, before the House Subcommittee on Labor Standards, Committee on Education and Labor, U.S. House of Representatives, Serial No. 102-122.

[27] *See*, 52 *Fed.Reg.* 2032 (1987), cited at pp. 4 of Petitioners' Brief.

[28] 61 *Fed.Reg.* 23239-23240, fn. 19, *supra*.

The fact that 29 C.F.R. §541.5d is silent as to disciplinary suspensions, then, is not because the Department of Labor considered the issue and decided not to act, but because it has simply shirked its congressionally-mandated duty to reasonably interpret the Fair Labor Standards Act,[29] which under Section 6 of the 1985 public sector amendments, includes an express congressional directive to "promulgate such regulations as may be required to implement Congress' explicit accommodation to the special needs of state and local agencies.[30]

As the Ninth Circuit correctly noted in *SEIU*, the Labor Department promised rule-making regarding the partial-day docking component in January of 1987, and yet it was not until September of 1991 that 29 C.F.R. §541.5d finally came into being, and 1992 before it actually became final. Similarly, in September of 1992, the Department of Labor once again deferred consideration of public sector problems with the disciplinary component of the regulation to "a later day" that has yet to come: We are now in 1996 with no hope of a regulatory amendment in sight, many wishful regulatory agendas to that effect notwithstanding.

B. The entire salary basis test, including its disciplinary component, is contrary to express congressional intent that white-collar employees not be paid overtime.

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[29] *See*, 29 U.S.C. §213(a)(1) *expressly* exempting "executive, administrative, and professional" employees from the overtime provisions of section 207 of the Fair Labor Standards Act "as such terms are defined and delimited from time to time by regulations of the Secretary."

[30] P.L. 99-150, §6; 99 Stat. 790, cited at p. 17 of Petitioners' Brief.

Section 213(a)(1) of the *Fair Labor Standards Act* expressly exempts "bona fide executive, administrative, or professional capacity" employees from the time-and-a-half provisions of Section 207(a)(1) of the Act.[31] As the Ninth Circuit noted in *SEIU*, Congress was silent with regards to the salary basis test when it enacted the *Fair Labor Standards Act* in 1938 and when it amended it in 1974 and 1985.[32] The clear congressional intent to be reasonably inferred from this fact is that Congress intended public sector employers to pay overtime at time-and-a-half, *but not to white-collar employees*, since Congress retained and meant to preserve the white-collar exemption in the public sector.[33]

The disciplinary problem arises only because the Labor Department found it necessary to carve out yet another regulatory exception to its ill-fated salary basis test. As stated in *SEIU*, the salary basis test is wholly a creation of the Department of Labor, not Congress. The very fact that the Labor Department has found it necessary to retreat piecemeal from this test with regulatory exceptions such as 29 C.F.R. §541.118(a)(2) through (5), all dealing with circumstances beyond the employer's control, obliterates the white-collar exemption expressly created and intended by Congress to apply in the public sector, and concedes conflict with it. This probably explains their inertia at further amending the regulation, despite awareness of serious problems with it in the public sector, first with the docking component, and then with the disciplinary aspect of the regulation: It is difficult to fix a test that makes no practical sense and contradicts an express congressional mandate. To do so would only

[31] *See* 29 U.S.C. §§213(a)(1) and 207(a)(1).

[32] *SEIU, supra*, at 1351.

[33] *Ibid.*.

concede the inevitable demise of an already infamous regulation.

As to the disciplinary component in particular, it is doubtful that the federal Congress would have intended to chill or interfere with as mundane and local a subject as an employer's inherent right, since time immemorial, to discipline its employees. That is a subject, which particularly in the public sector, is best left to local regulation. The employer is usually in the best position to determine what the most appropriate discipline is under the circumstances. A federal regulation that encourages excessive discipline — or discourages it at all for fear of costly overtime liability — encourages misconduct, is irrational, arbitrary and capricious, and cannot be upheld. Moreover, allowing the employer to impose minor disciplinary deductions in pay at its discretion is very important as a deterrent to possibly greater misconduct in the future. The infractions excluded from the regulatory exception are usually the sort of misconduct that the public — to which state and local governments are accountable — and private society at large, does not, and should not, want to allow going unpunished or punished improperly, precisely because they can be conducive to greater social ills, and are usually very disturbing (*eg.*, a first-time racial slur, a sexually-offensive comment, *etcetera*).

Congress did not intend, and from the express language of the Fair Labor Standards Act, it never actually put employers to the choice between disciplining its employees consistently, fairly, and appropriately, or paying them overtime at premium rates. Common sense and sound public policy would have precluded Congress, and hopefully the Secretary of Labor and this Court, from forcing employers to treat employees committing the same disciplinary violation differently *solely* because of their

FLSA-exempt status, which is the practical effect of the regulation in question. Discipline, to be respected and effective, has to be applied fairly and consistently to all employees.[34]

C. *The salary basis test is arbitrary and capricious and contrary to sound public policy.*

A basic tenet of our jurisprudence is that no one should profit from his own wrong. A regulation that rewards employee misconduct by requiring an employer to pay overtime to *all* employees at premium rates solely because the employer chooses to discipline an otherwise-exempt employee in a certain way — by imposing unpaid suspensions in increments of less than a week — violates this principle and makes no sense. As illustrated in the *Prologue*, lesser suspensions, such as oral warnings or reassignment, might not be meaningful or practical; greater suspensions might be abusive and unfair to the employee.

Subdivision (a)(1) of Section 541.118 states that salary status is lost for deductions from pay caused by the employer. By negative implication, the employer, which in this case is the public fisc, should not be penalized for deductions occasioned by employee misconduct. The old regulation, 29 C.F.R. §541.118, already partially recognizes this, by allowing deductions for absences due to serious safety violations. The distinction between serious safety violations and other types of disciplinary violations is also not reasonable for the reasons set forth in the *Prologue*.

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[34] *Cf., eg., Huey v. Honeywell*, 82 F. 3d 327, 332 (9th Cir. 1996), recognizing that where an employer issues a disciplinary policy statement, in a manual or otherwise, it encourages employee reliance on it and the employer is not free to disregard it or to selectively apply it.

The entire salary basis test makes even less sense considering that the Labor Department has seen fit to dispense with the salary basis test entirely for other similarly-situated white-collar employees in both the public and the private sector, including its own: federal government employees;[35] lawyers, doctors, and teachers;[36] and computer programmers, if they make 6 1/2 times the minimum wage[37] — which incidentally, most plaintiffs in these cases exceed— are all exempted from the salary basis test. Regulations distinguishing among similarly situated white-collar employees — and particularly among Federal and state and local government employees — for no apparent reason, are inconsistent, irrational, and invalid under the Administrative Procedure Act. They also violate that basic principle of equality and fair treatment under the law.

The arbitrariness and capriciousness of the regulation reach their maximum height with the use of the term "subject to" that the Labor Department has now found necessary to retreat from and redefine in this case. It is a technical absurdity to impose the type of astronomical liability estimated at close to ten million dollars for this friend of the Court, and hundreds of millions, if not billions for the entire public sector in the United States—and ultimately the American taxpayer—solely because of the theoretical possibility of a disciplinary deduction that rarely, if ever, is imposed on any of these high-level executives, managers and professionals who, by virtue of their training and station in life are hopefully less inclined to commit these violations

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[35] 5 C.F.R. §551.203-206.

[36] 29 C.F.R. §541.314.

[37] 29 C.F.R. §541.312.

anyhow. Nevertheless, that is what the regulations seem to say.

Ultimately, it cannot be ignored that these Plaintiffs are not the minimum-wage employees struggling to make a living whom Congress sought to protect in 1938.[38] They are, rather, America's highest paid public servants, making between $70,000 and $100,000 or more at DWP, and enjoying every protection of civil service systems and collective bargaining processes that, besides their talent and effort, have gotten them to their high station in life. They are hardly in need of the minimum-wage and time-and-a-half overtime protection expressly intended by Congress for the wage-earners at the lowest echelons of the labor force. The salary test is thus overinclusive and contrary to clear congressional intent.

II. THE REGULATION VIOLATES STATES' RIGHTS UNDER THE TENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

In *Garcia v. San Antonio Metropolitan Transit Authority*[39] this Court, by a bare majority with whom its current Chief Justice strongly dissented, held that the *Fair Labor Standards Act* did not violate States' rights under the Tenth Amendment of the United States Constitution, because "the political process ensures that laws that unduly burden the States will not be promulgated."

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[38] *See* 29 U.S.C. §202. For more recent evidence of this intent, *see* P.L. 101-583, 104 Stat. 2871 (Nov. 15, 1990) Congressional directive to the Secretary of Labor to revise the salary basis regulations to exempt therefrom computer operators making more than 6 1/2 times the minimum wage, and the resulting regulation, 29 C.F.R. §541.312.

[39] *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 556, 105, S.Ct. 1005, 83 L.Ed. 2d 1016, 1037 (1985).

Just like it is not necessarily the FLSA that violates the Tenth Amendment, but rather the salary basis regulation, it is not as necessary to overrule *Garcia* — as much as the public sector would like that — as it is simply to apply it: the political process for addressing public sector concerns and resolving conflict regarding the salary basis test has failed since *Garcia* was decided.

As pointed out in footnotes 21 and 22 at page 27 of Petitioners' Brief, six times since 1991 bills have come before Congress proposing to amend the salary basis test in the public sector, and six times Congress has declined to act on them, despite having taken extensive testimony from public employers. Since the Department of Labor created the salary test, they can amend it or eliminate it without congressional amendment, which would be superfluous. The Department of Labor acknowledged this much at congressional hearings held in Washington on September 16, 1992 regarding the retroactivity of 29 C.F.R. §541.5d.[40]

But despite their congressionally mandated duty to interpret the FLSA and accommodate the public sector regarding it, the Department of Labor continues to this day to dump the task on already overburdened courts, through extended periods of regulatory inaction described above, and despite frequent regulatory agendas acknowledging the seriousness of the problem, such as 61 *Fed.Reg.* 23239-40. But nothing gets accomplished, despite recent exhortation by even the current White House administration, in an April 14, 1994 letter from Leon Panetta, addressed to the Secretary of Labor personally, asking that he act to remedy the problem.

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[40] *See Congressional Subcommittee hearing transcripts,* pp. 35-36, *ibid., fn.* 26, *supra.*

The courts are doing their best to fill this regulatory void, unfortunately with very inconsistent results, and are ultimately — and perhaps unwittingly — literally passing the buck to the American taxpayer, who really has no political recourse on this issue, since public entities cannot vote, and the American public is not even aware of the problem or its seriousness — a problem that remains unresolved through both Republican and Democratic administrations.

CONCLUSION

The ratepayers of the Department of Water and Power of the City of Los Angeles therefore join Respondents in urging this Court to AFFIRM the decision of the Eighth Circuit below as to the interpretation of the term "subject to" and the application of the "window of correction," and implore this court of last resort to go further in the interests of justice, and invalidate the entire salary basis test, or at least its disciplinary component, based upon the common sense, statutory, and constitutional principles articulated here, or any others that this venerable Court may deem to have merit.

Respectfully submitted, this 10th day of October, 1996.

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APPENDIX

APPENDIX OF NINTH CIRCUIT CASES CURRENTLY PENDING REGARDING THE VALIDITY OF 29 C.F.R. §541.118(a)(5)

Stanley v. City of Tracy, U.S.C.A. Case No. 95-16242 - oral arguments to be heard as scheduled on October 10, 1996.

Block v. Los Angeles Dept. of Water of Water & Power, U.S.C.A. Case No. 94-56135, consolidated with 94-56421 and 95-55345 - argued and submitted on March 6, 1996; submission vacated pending disposition of *Auer v. Robbins herein*, per Ninth Circuit Order filed October 2, 1996.

McGuire v. City of Portland, Oregon, U.S.C.A. Case No. 95-35391, 91 F.3d 1293 (9th Cir., August 2, 1996), *decision on rhr'g pet. deferred, pending Supreme Court's decision in Auer v. Robbins herein.*

Higuera v. City of Los Angeles and Dept. of Water and Power, U.S.C.A. Case Nos. 96-55325, 96-55418, 96-55419, 96-55840, 96-55841, and 96-55844 (DWP's Opening Brief filed October 1, 1996).

Harding v. City of Los Angeles, U.S.C.A. Case No. 96-55286 (being briefed).

Morsch v. City of Los Angeles, U.S.C.A. Case No. 94-56701 (being briefed).

(19)

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In The
Supreme Court of the United States
October Term, 1996

FRANCES BERNARD AUER,
et al.
Petitioners,

v.

DONALD A. ROBBINS,
et al.
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

BRIEF OF THE STATES, WISCONSIN, ET AL., AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

Page

INTERESTS OF AMICI 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

Congress could not have intended, under its commerce power, to prohibit States from disciplining workers as required by public accountability 4

I. The prohibition is irrational, particularly as to public employers. 4

II. Public accountability is best served through no more and no less than the proper dose of discipline. 10

A. The prohibition deprives States of the vital tool of progressive discipline 10

B. The discipline imposed by public employers is regularly scrutinized to assure it is commensurate with the misconduct 12

Page

III. Applying the prohibition to States breaches constitutional boundaries 15

A. The Founders assumed it was central to any republican government to control its own workers with suspensions and pay deductions 15

B. Congress may not constitutionally bar States from properly suspending workers 23

CONCLUSION 30

CASES CITED

Adkins v. Div. of Youth Services, Dep't of Institutions, 720 P.2d 626 (Colo.Ct.App. 1986) 12

Auer v. Robbins, 65 F.3d 702 (8th Cir. 1995), *cert. granted*, 95-897 ..... 1, 2, 23

Blake v. State Personnel Bd., 25 Cal.App.3d 541, 102 Cal.Rptr. 50 (Ct.App. 1972) 12

Bolick v. Brevard County Sheriff's Dept., 1996 WL 490201, *11 (M.D.Fla. 1996) 5

Bowman v. City of Indianapolis, 927 F.Supp. 309 (S.D.Ind. 1996) 5

Page

Bowman v. State, 573 N.E.2d 910 (Ind.Ct.App. 1991), *cert. denied*, 504 U.S. 986 (1992) 5

Bowsher v. Synar, 478 U.S. 714 (1986) 22

Boyce v. United States, 543 F.2d 1290 (Ct.Cl. 1976) 13

Brown v. Ohio Bureau of Employee Services, 70 Ohio St.3d 1, 635 N.E.2d 1230 (1994) . 12, 13, 14

Brown v. U.S. Postal Service, 860 F.2d 884 (9th Cir. 1988) 13

City of St. Louis v. Praprotnik, 485 U.S. 112 (1988) 13

Clark v. Canandaigua City School Dist., 179 A.D.2d 1006, 579 N.Y.S.2d 275 (Ct.App. 1992), *aff'd*, 602 N.E.2d 228 (N.Y. 1992) 12

Community College Dist. 508 v. McKinley, 160 Ill.App.3d 916, 513 N.E.2d 951, 112 Ill.Dec. 342 (1987) 13

Cottage Savings Ass'n v. Commissioner, 499 U.S. 554 (1991) 8

Edward J. DeBartolo Corp. v. Fla. Gulf Coast Tr. Coun., 485 U.S. 568 (1988) 29

English v. College of Medicine & Dentistry of New Jersey, 73 N.J. 20, 372 A.2d 295 (1977) 13, 14

Farmers Insurance Group v. Santa Clara County, 11 Cal.4th 992, 906 P.2d 440, 47 Cal.Rptr.2d 478 (1995) 13

Freytag v. C.I.R., 501 U.S. 868 (1991) 22

Freytag v. C.I.R., 501 U.S. 892 (1991) (Scalia, O'Connor, Kennedy and Souter, JJ., concurring) 15

Gallagher v. Cawley, 43 A.D.2d 931, 353 N.Y.S.2d 3 (Ct. App. 1974) 13, 14

Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985) ... 4, 8, 24-28

Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 557 (1985) (Powell, J., Rehnquist, Burger, C.J., & O'Connor, J. dissenting) 28

Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 580 (1985) (O'Connor, Powell, & Rehnquist, JJ., dissenting) 28

Gerhold v. New Orleans Police Dep't, 503 So.2d 206 (La.Ct.App. 1987) 12

Gregory v. Ashcroft, 501 U.S. 452 (1991) 25

Gulf Coast Industrial Workers Union v. Exxon Co., U.S.A., 991 F.2d 244 (5th Cir. 1993) 14

Harrison v. Metro Government of Nashville, 80 F.3d 1107 (6th Cir. 1996) 10

Highland Farm Dairy v. Agnew, 300 U.S. 608 (1937) 28

In re Appeal of Fuller, 25 Pa.Cmwlth 116, 358 A.2d 756 (1976) 14

In re Butner, 39 Wash.App. 408, 693 P.2d 733 (1985) 12

In re Kennedy, 442 So.2d 566 (La.Ct.App. 1983) 13

John Hancock Life Insurance v. Harris Bank, 510 U.S. 86, 114 S.Ct. 517 (1993) 5

Kaminsky v. Bd. Fire Commissioners of Village of Wheeling, 201 Ill. App. 3d 262, 559 N.E.2d 87, 147 Ill.Dec. 87 (Ct.App. 1990) 12-14

Kilbourn v. Thompson, 103 U.S. 168 (1880), *criticized on other grds.*, Hutcheson v. United States, 369 U.S. 599 (1962) 21

Lower Merion Township v. Turkelson, 396 Pa. 374, 152 A.2d 724 (1959) 13, 14

Massingale v. Police Bd. of City of Chicago, 140 Ill.App.3d 378, 488 N.E.2d 1289, 94 Ill.Dec. 896 (1986) 13

Minor v. Happersett, 88 U.S. 162 (1875) 29

Mueller v. Reich, 54 F.3d 438 (7th Cir. 1995), *cert. pet. pending*, Wisconsin v. Mueller, No. 95-586 ..... 2, 4, 5, 11, 12, 23

National League of Cities v. Brennan, 419 U.S. 1321 (1974) 8

New York v. United States, 505 U.S. 144 (1992) 23-29

New York, 505 U.S. 188 (1992) (White, Blackmun & Stevens, JJ., concurring and dissenting) 25

NLRB v. Catholic Bishop of Chicago, 440 U.S. 490 (1979) 29

Overnight Motor Transportation Co. v. Missel, 316 U.S. 572 (1942) 5

Personnel Administrator v. Feeney, 442 U.S. 256 (1979) 10

Reich v. Newspapers of New England, Inc., 44 F.3d 1060 (1st Cir. 1995) 4

Reich v. Parker Fire Protection Dist., 992 F.2d 1023 (10th Cir. 1993) 4, 5

Reich v. State of New York, 3 F.3d 581, 587 (2nd Cir. 1993) 4

Reichenbach v. Civil Service Comm'n of Borough of Wilkinsburg, 53 Pa.Cmwlth. 363, 417 A.2d 1292 (1980) 12-14

Rizzo v. Goode, 423 U.S. 362 (1976) 26

Seminole Tribe of Florida v. Florida, 116 S.Ct. 1114 (1996) 2

State ex rel. Smits v. City of De Pere, 104 Wis.2d 26, 310 N.W.2d 607 (1981) 12-14

Taylor v. Dep't of Health and Human Resources, 491 So.2d 752 (La.Ct.App. 1986) 13

Tennes v. Com. of Mass., Dept. of Revenue, 944 F.2d 372 (7th Cir. 1991) 10

Town of Belleville v. Coppla, 187 N.J.Super. 147, 453 A.2d 1344 (1982) 13, 14

Town of West New York v. Bock, 38 N.J. 500, 186 A.2d 97 (1962) 14

Township of Moorestown v. Armstrong, 89 N.J.Super. 560, 215 A.2d 775 (Ct.App. 1965), *certification denied* 13, 14

U.S. Term Limits v. Thornton, 115 S.Ct. 1842 (1995) 25

U.S. Term Limits v. Thornton, 115 S.Ct. 1872 (1995) (Kennedy, J., concurring) 25, 27

Ullman v. United States, 350 U.S. 422 (1956) 29

United States v. Lopez, 115 S.Ct. 1624 (1995) 26

Walcott v. City of Plainfield, 282 N.J.Super. 121, 659 A.2d 532 (Ct.App. 1995) 12, 13

Ward v. Brown, 22 F.3d 156 (2nd Cir. 1994) 13

Yourman v. Dinkins, 84 F.3d 655 (2nd Cir. 1996) *cert. pet. pending*, Giuliani v. Yourman, No. 96-152. ..... 2, 8

CONSTITUTIONAL PROVISIONS CITED

U.S.Const., Art. I, § 5, cl. 1 21

U.S.Const., Art. I, § 8, cl. 3 ..... 4, 23, 24, 26, 27

U.S.Const., Art. I, § 8, cl. 18 ..... 23, 27

U.S.Const., Art. IV, § 4 ..... 15, 23, 24, 28, 29

U.S.Const., Amend X 15, 23, 24, 28, 29

STATUTES AND RULES CITED

2 U.S.C. § 60-1 7

5 U.S.C. § 706(2)(A) 5

5 U.S.C. § 7501(1) 7

5 U.S.C. § 7503(a) 7

29 U.S.C. § 204(f) 7

29 U.S.C. § 207 *et seq.* 1-6, 8, 10, 23, 24, 26, 28

29 U.S.C. § 207 4

29 U.S.C. § 213(a)(1) 4, 7

29 U.S.C. § 216 2

5 C.F.R. Part 551, Subpart B 7

29 C.F.R. § 541.1 4

29 C.F.R. § 541.2 4

29 C.F.R. § 541.3 4

29 C.F.R. § 541.5d 6, 9

29 C.F.R. § 541.5d(a)(1) 6

OTHER AUTHORITIES

1966 U.S. Code & Admin. News 3002 7

1974 U.S. Code & Admin. News 2811 7

29 C.F.R. § 541.118 4

29 C.F.R. § 541.118(a) 4

29 C.F.R. § 541.118(a)(5) 2, 4, 6

29 C.F.R. § 541.118(a)(6) 2

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No. 95-897

In The

Supreme Court of the United States

October Term, 1996

FRANCES BERNARD AUER,
et al.
Petitioners,

v.

DONALD A. ROBBINS,
et al.
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

BRIEF OF THE STATES, WISCONSIN, ET AL., AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

INTERESTS OF AMICI

Under the agency interpretation of the Fair Labor Standards Act, 29 U.S.C. § 207 *et seq.*, (the FLSA) at issue, States face paying billions of dollars because, in accounting to their citizens and maintaining republican forms of government, they impose proper discipline on their executives and professionals. The court below, without analysis, assumed the agency interpretation validly applies to public employers. Auer v. Robbins, 65 F.3d 702, 710, n. 6 (8th Cir. 1995), *cert. granted*, 95-897. Whether that assumption is correct is critical to the States' fisc and internal operations, to States accounting

to their own citizenries and to the status of States as coequal sovereigns in our federal system.

Subject to FLSA enforcement (29 U.S.C. § 216 as limited by Seminole Tribe of Florida v. Florida, 116 S.Ct. 1114, 1124-28, 1131-32 (1996)), States must comply with this agency interpretation or risk substantial liability. *E.g.*, Mueller v. Reich, 54 F.3d 438 (7th Cir. 1995), *cert. pet. pending*, Wisconsin v. Mueller, No. 95-586; Yourman v. Dinkins, 84 F.3d 655, 656 (2nd Cir. 1996) and cases cited, *cert. pet. pending*, Giuliani v. Yourman, No. 96-152. The appellate court below at least refrained from wholesale abolition of exemptions where discipline contrary to federal agency dictates is only isolated and is corrected by the employer. *Compare* Auer, 65 F.3d at 710-11 *with* Mueller, 54 F.3d at 441-43 and Yourman, 84 F.3d at 655-56. The "window of correction" is a welcome respite to public employers trying to make ends meet. *E.g.*, Auer, 65 F.3d at 710-11. The price of "correction" is to promise future compliance (29 C.F.R. § 541.118(a)(6)), surrendering precisely what the Founders strived to preserve: accountability of local workers through local control. Recognizing other amici will address effects on States' political subdivisions, this brief is submitted to inform the Court why the interpretation is irrational as to States, obstructs public accountability, and may not constitutionally be applied to States.

SUMMARY OF ARGUMENT

An interpretation of the FLSA by the United States Department of Labor (USDOL) mandates the payment of overtime to executives and professionals, whom Congress intended to exempt from those federal mandates, if those executives and professionals are subject to non-safety related disciplinary suspensions for less than full workweek increments. 29 C.F.R. § 541.118(a)(5). USDOL has not reexamined the interpretation since the FLSA was extended to public employers.

1. The agency interpretation is irrational as to all employers, but particularly public employers. It prohibits imposing proper discipline with no apparent connection to the salary criterion it purports to apply. For example, imposing multiple mid-week suspensions, to emphasize they are discipline for misconduct, is barred and only the equivalent of unpaid vacation bracketed by weekends is allowed. It does not relate to whether a worker is an executive or professional. For example, suspending a dentist for one hour is allowed while suspending a psychologist for a full day is not. Applying the interpretation to States is so irrational it is contrary to USDOL's own regulations and how the federal government treats its own workers. USDOL has never articulated any rationale.

2. Prohibiting proper disciplinary suspensions vitiates the critical tool of progressive discipline and contradicts requirements that State employers impose no more and no less than the proper dose of discipline. Even if States try to comply with USDOL dictates, reviewing bodies, by ordering States to impose proper discipline, could jeopardize FLSA exempt status and require State taxpayers to pay wayward employes a windfall of back pay and future overtime pay.

3. Historical records demonstrate the Founders recognized the ability to discipline workers for misconduct is essential to any republican form of government. Controlling official misconduct through pay was, to them, critical to sovereignty and public accountability. Localizing control of misconduct was a central goal of the American Revolution. The USDOL interpretation undermines the delicate balance between the federal and State sovereignties protected by a web of constitutional provisions. The rivalry between vibrant governmental competitors, the Founders' ingenious creation, is sapped at its core. Congress did not intend to force States to breach the duty to their citizens of imposing discipline commensurate with misconduct.

ARGUMENT

Congress could not have intended, under its commerce power, to prohibit States from disciplining workers as required by public accountability.

The FLSA, grounded on the Commerce Clause (Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 530 (1985)), requires employers to pay overtime compensation while exempting executives, professionals and others. 29 U.S.C. §§ 207 and 213(a)(1). USDOL regulations, defining those exemptions, focus on duties and add a "salary" criterion without articulating what that means. 29 C.F.R. §§ 541.1, 541.2 and 541.3. The disciplinary deduction prohibition at issue requires executives and professionals be treated as hourly workers entitled to overtime if an unpaid suspension is imposed for non-safety reasons during any workweek in which any work is performed. 29 C.F.R. § 541.118(a) and (a)(5). The prohibition, as part of the "salary basis test" (29 C.F.R. § 541.118), a mere interpretation (29 C.F.R. § 541.99), is not a law or a regulation. *Cf.* Reich v. Newspapers of New England, Inc., 44 F.3d 1060, 1070-72 (1st Cir. 1995); Reich v. State of New York, 3 F.3d 581, 587 (2nd Cir. 1993); Reich v. Parker Fire Protection Dist., 992 F.2d 1023, 1026 (10th Cir. 1993), *rehearing and rehearing en banc denied*. *But see, e.g.*, Mueller, 54 F.3d at 442-43. Though irrational as to all employers, the prohibition, applied to public employers, threatens the core of effective republican governments which the Founders sought to preserve and the Constitution sought to protect.

I. The prohibition is irrational, particularly as to public employers.

As a non-regulatory interpretation, the prohibition is valid only if it is internally persuasive. *E.g.*, Reich v. Newspapers, 44 F.3d at 1070-72; Reich v. New York,

3 F.3d at 587; Reich v. Parker, 992 F.2d at 1026 and cases cited. *See also* John Hancock Life Insurance v. Harris Bank, 510 U.S. 86, 114 S.Ct. 517, 529 and 533 (1993). *But see, e.g.*, Mueller, 54 F.3d at 442-43. The prohibition, as a way to distinguish "salaried" from "hourly" workers, is not internally persuasive. Even if it were a regulation, it would be arbitrary, irrational and invalid as to all employers. 5 U.S.C. § 706(2)(A); Bowman v. City of Indianapolis, 927 F.Supp. 309, 315-16 (S.D.Ind. 1996); Bowman v. State, 573 N.E.2d 910 (Ind.Ct.App. 1991), *cert. denied*, 504 U.S. 986 (1992); Bolick v. Brevard County Sheriff's Dept., 1996 WL 490201, *11 (M.D.Fla. 1996). A few examples show why:

1. If an exempt worker with a four-day workweek admits, one day into a workweek, having stolen employer-owned property and a disciplinary suspension is the proper discipline, no suspension could start until the next workweek. For the three days left in the workweek that theft is admitted, the employer could only suspend the worker with pay or allow the undisciplined worker to stay in the workplace. Requiring pay for a day in which no work is performed is a far cry from the original intent expressed by President Roosevelt when signing the FLSA: "'A fair day's pay for a fair day's work.'" Overnight Motor Transportation Co. v. Missel, 316 U.S. 572, 578 (1942).

2. A suspension of that worker, delayed until the next workweek, for 5, 10, 14, 15 or 30 days would still jeopardize the FLSA exemption. Neither 5, 10, 14, 15 or 30 are divisible by 4, the number of days the worker works. Pay would be deducted during at least one workweek in which work is performed. Barring suspensions calculated in full days has no rational connection to status as an executive or professional.

3. Scheduling several mid-week suspension days, to focus the offending worker on correcting misconduct, is precluded. USDOL requires employers, in

disciplining exempt workers, to give them the equivalent of unpaid vacation time bracketed by weekends.

4. Employers may suspend a dentist or optometrist for an hour's pay without affecting exempt status. 29 C.F.R. § 541.314(b)(1). Suspending a psychologist or a therapist for three full workdays destroys exempt status. 29 C.F.R. § 541.314(c).

5. Reserving suspensions for less than full workweeks to violations of "safety rules of major significance" (29 C.F.R. § 541.118(a)(5)) makes no sense. If USDOL thinks proper discipline of workers risking their own safety may include a two-day suspension, why preclude similar discipline for lying to their employers?

Applying the prohibition to **public** employers contradicts USDOL's own regulations. "[P]ublic accountability" requires that public employers be able to deduct pay for each hour an FLSA exempt employe takes off without permission. 29 C.F.R. § 541.5d(a)(1). USDOL admits, in other words, that treating public workers on an "hourly" basis should be irrelevant to exempt status. Nonetheless, the prohibition would cause complete loss of exempt status if **full** workday disciplinary suspensions occur. Deducting an hour's pay to account for time taken without permission is acceptable. Deducting a full day's pay as discipline, because a worker disobeyed orders not to leave work, destroys exempt status. USDOL, adopting 29 C.F.R. § 541.5d, admitted the public "does not tolerate wasteful and abusive excesses such as padded payrolls or 'phantom' employes." 57 Fed. Reg. 37673 (August 19, 1992). Yet the disciplinary deduction prohibition obstructs State efforts to address those very abuses.

The USDOL exemption structure is so contrary to public accountability that the Civil Service Commission, applying the FLSA to federal employers, rejected "salary" (and thereby the prohibition) as a way to determine exempt status. 40 Fed. Reg. 27640-27641 (July 1, 1975);

5 C.F.R. Part 551, Subpart B. Since salary does not appear, as a potential exemption criterion for public employers, in the statute (29 U.S.C. § 213(a)(1)) or legislative history (1966 U.S. Code & Admin. News 3002; 1974 U.S. Code & Admin. News 2811), these rational regulations, recognizing public accountability, are valid. Realizing suspensions are vital to public accountability, Congress has authorized federal employers to discipline misconduct with open-ended suspensions. *E.g.*, 5 U.S.C. §§ 7501(1) and 7503(a) (suspensions ranging from 1 to 14 days for repeated "discourteous" behavior towards public); 2 U.S.C. § 60-1 (Congressional employers). USDOL is itself able to impose open-ended suspensions while still exempting its own executives and professionals. 29 U.S.C. § 204(f); 5 C.F.R. Part 551, Subpart B.

No rationale was articulated for the prohibition much less for applying it to public employers. The Weiss Report, a half-century old, was USDOL's sole explanation of any version of the prohibition. H. Weiss, Report and Recommendations on Proposed Revisions of Regulations, Part 541 24-26 (USDOL June, 1949). USDOL rejected the Weiss Report recommendation by adopting the salary basis test without **any** disciplinary deduction prohibition. 14 Fed. Reg. 7703 (December 28, 1949).

USDOL next addressed the issue in 1954, when it proposed amending the salary basis test to prohibit most disciplinary deductions while allowing deductions for "major disciplinary reasons." 19 Fed. Reg. 1321-1322 (March 9, 1954). This broader exception was deleted from the final amendments in response to undisclosed "comments." 19 Fed. Reg. 4405-4406 (July 17, 1954). The prohibition, as first adopted in 1954, continues unaltered to the present date and has not since been reexamined. 57 Fed. Reg. 37672, n. 11 and 37674 (August 19, 1992).

Had the Weiss Report recommendations not been rejected by USDOL, and had the prohibition, adopted five years later without explanation, not been different, the

prohibition would still lack articulated rationale. The Weiss report recommended prohibiting **all** disciplinary deductions: (1) for administrative convenience and (2) because few private employers then covered ever disciplined exempt workers. The Weiss Report at 24-26. Even without constitutional concerns, courts are skeptical of rationales of administrative convenience if the results of the chosen course are confusing and complex (*e.g.*, Cottage Savings Ass'n v. Commissioner, 499 U.S. 554, 565-66 (1991)) as here (*e.g.*, Yourman, 84 F.3d at 655-56). A cursory look at modern employment law confirms that assuming employers rarely discipline their executives and professionals under **any** circumstances, if ever correct, is now woefully outdated. Professionals alone are 15% of the workforce. U.S.News & World Rpt. 12 (Sept. 9, 1996).

After the FLSA was extended to nearly all public workers, USDOL should have decided how the exemptions would operate in the public sector. Between this extension of the FLSA to public employers being stayed (National League of Cities v. Brennan, 419 U.S. 1321, 1323 (1974)) and Garcia issuing in 1985, USDOL did nothing. In 1985, USDOL, recognizing problems between civil service systems and its salary criterion, and that federal workers had not been governed by any salary criterion during the prior decade, asked for comments on whether its salary criterion should be entirely abandoned. 50 Fed. Reg. 47696-47997 (November 19, 1985).

Since 1985, USDOL has deflected public and private objections to the salary criterion, the salary basis test and the prohibition into a separate black hole through which it defers reconsideration with constantly retreating deadlines. 51 Fed. Reg. 2525 (January 17, 1986); 54 Fed. Reg. 44836-44837 (October 30, 1989); 55 Fed. Reg. 16372 (April 23, 1990); 55 Fed. Reg. 44639 (October 29, 1990); 56 Fed. Reg. 17537 (April 22, 1991); 56 Fed. Reg. 45824 (September 6, 1991); 56 Fed. Reg. 53567 (October 21, 1991); 57 Fed. Reg. 16960 (April 27, 1992); 57 Fed. Reg. 51565 (November 3, 1992); 58 Fed.

Reg. 24569 (April 26, 1993); 58 Fed. Reg. 56587 (October 25, 1993); 59 Fed. Reg. 20610 (April 25, 1994); 59 Fed. Reg. 57129 and 57140 (November 14, 1994); 60 Fed. Reg. 23544-23545 (May 8, 1995); 60 Fed. Reg. 59613-59614 (November 28, 1995); 61 Fed. Reg. 23238-23240 (May 13, 1996). Though recognizing its entire exemption structure is "sorely out of date" and fraught with "confusion" (59 Fed. Reg. 57129 and 57140 (November 14, 1994); 60 Fed. Reg. 23544 and 23545 (May 8, 1995)), USDOL continues to defer these deadlines. Responding to specific public employer objections to parts of the salary basis test, it admitted the core of the test is antithetical to public employment. 29 C.F.R. § 541.5d; 57 Fed. Reg. 37666-37677 (August 19, 1992). Even then, USDOL ignored pleas to look at the disciplinary deduction prohibition:

> Section 541.118(a)(5) was not open for comment during the present rulemaking. However, [USDOL] expects to consider this issue as appropriate in proposed revisions of Part 541 at a later date.

57 Fed. Reg. at 37674. Kafka's parable comes to mind:

> Before the Law stands a doorkeeper. To this doorkeeper there comes a man from the country and prays for admittance to the Law. But the doorkeeper says he cannot grant admittance at the moment. The man thinks it over and then asks if he will be allowed in later. "It is possible," says the doorkeeper, "but not at the moment. . . . "

Kafka, "Before the Law", Franz Kafka: The Complete Stories 3-4 (Glatzer ed. 1972). The man remains, receiving sporadic hopes of entry at constantly retreating moments, until he dies and the door, having served its purpose, is closed. *Id.* The duty of States to account to their citizens, and federal obstruction of that duty, merit careful consideration.

II. Public accountability is best served through no more and no less than the proper dose of discipline.

A. The prohibition deprives States of the vital tool of progressive discipline.

Suspensions are usually part of a "progressive discipline" process which seeks to correct misconduct, rather than punish, by rationally assessing discipline appropriate to the misconduct and to prior disciplinary history. *E.g.*, Buhler, *Administering Discipline in the Organization: Managing in the 90s,* 17 Supervision (November 1, 1993), 1993 WL 2952158. Progressive discipline policies may be crucial in evaluating challenges to discipline taken by public employers. *E.g.*, Harrison v. Metro Government of Nashville, 80 F.3d 1107, 1111, 1117 (6th Cir. 1996) (pretext where another employe disciplined less severely); Tennes v. Com. of Mass., Dept. of Revenue, 944 F.2d 372, 379 (7th Cir. 1991) (same). *See* Personnel Administrator v. Feeney, 442 U.S. 256, 279 (1979).

Congress did not intend, by extending the FLSA to all public employers, to create substantial disparities in the discipline imposed upon public workers solely because they are "exempt" or "non-exempt" under the FLSA. Assume two workers with similar employment profiles. Each engages in misconduct so similar any reasonable employer would impose a two-day suspension on each worker. If the exempt worker is reprimanded while the non-exempt worker is suspended, the non-exempt worker may allege irrationality or illegal discrimination. By contrast, if the exempt worker is suspended for five days while the non-exempt worker is suspended for two days, the exempt worker may allege irrationality or illegal discrimination. Articulating rationality would be an elusive task, particularly if gender or race issues heighten scrutiny by reviewing bodies.

The cost to taxpayers of disrupting progressive discipline just begins with the liability threatened by the USDOL prohibition. Measured State directives to fulfill accountability duties are disrupted by USDOL's irrational prohibition. *E.g.*, State Ap. 123-125 (Colorado statute, fining State supervisors at least "three days salary" for failing to monitor subordinates' performance of public duties, recast to fit within USDOL confines on discipline in response to FLSA court claims). Progressive discipline seeks to correct misconduct so workers become productive. Replacing a worker costs far more than keeping a current worker. *E.g.*, Romano, "Pick up your Pencils: Use of Tests for Job Applicants," 5 Management Review (Aug. 1, 1994), 1994 WL 2813823 ("The cost of replacing managerial-level employees is 150 percent of their salaries"); Emerson, *Tips to Transcend the Turnover Trap,* 16, § 1 Minneapolis/St. Paul City Business (July 7, 1995), 1995 WL 8233929. "Discipline -- just like rewards -- can be a motivating factor if appropriately administered" and "[p]rogressive discipline is the best approach to disciplinary action." Buhler, *Administering Discipline in the Organization: Managing in the 90s,* 17 Supervision (November 1, 1993), 1993 WL 2952158. "People feel unjustly treated (and rightly so) if a minor infraction is disciplined with the same measures as a major infraction." *Id.* Imposing no discipline "can be just as costly as" imposing improper discipline because "'good' employes" become demoralized and this "often results in diminished performance levels among the 'good' employes." *Id.*

Requiring States to impose improper discipline disrupts more than the federal-State balance and State budgets. The balance, particularly in civil service systems, between a government and its workers is also disrupted. If an employer responds too leniently, the worker may be lulled into future misconduct. If an employer responds too harshly, the relationship may be ruptured. The USDOL prohibition does not just deprive State employers of one disciplinary tool among their "arsenals of disciplinary remedies" (Mueller, 54 F.3d at

443) which States should not have to surrender. The prohibition, for no valid reason, distorts and vitiates the corrective messages wayward workers must receive in the right dose to return to proper public service.

B. The discipline imposed by public employers is regularly scrutinized to assure it is commensurate with the misconduct.

As with many general principles of critical importance, the importance of States having power to impose proper discipline can be minimized by asking what difference it makes if a particular employe is suspended for five rather than three days. *E.g.*, Mueller 54 F.3d at 441-43. Even at the level of individualized analysis, however, the public demand for accountability shines through. The discipline imposed by State and local employers is frequently scrutinized to assure it is commensurate with the underlying misconduct rather than arbitrary and capricious. *E.g.*, Blake v. State Personnel Bd., 25 Cal.App.3d 541, 102 Cal.Rptr. 50, 57-58 (Ct.App. 1972); Adkins v. Div. of Youth Services, Dep't of Institutions, 720 P.2d 626, 627-29 (Colo.Ct.App. 1986), *rehearing denied, cert. denied*; Kaminsky v. Bd. Fire Commissioners of Village of Wheeling, 201 Ill. App. 3d 262, 559 N.E.2d 87, 88, 91, 147 Ill.Dec. 87 (Ct.App. 1990); Gerhold v. New Orleans Police Dep't, 503 So.2d 206, 207-08 (La.Ct.App. 1987), *rehearing denied, writ denied*; Walcott v. City of Plainfield, 282 N.J.Super. 121, 659 A.2d 532, 533-35 (Ct.App. 1995); Clark v. Canandaigua City School Dist., 179 A.D.2d 1006, 579 N.Y.S.2d 275, 276 (Ct.App. 1992), *aff'd*, 602 N.E.2d 228 (N.Y. 1992); Brown v. Ohio Bureau of Employee Services, 70 Ohio St.3d 1, 635 N.E.2d 1230, 1231 (1994); Reichenbach v. Civil Service Comm'n of Borough of Wilkinsburg, 53 Pa.Cmwlth. 363, 417 A.2d 1292, 1294 (1980); In re Butner, 39 Wash.App. 408, 693 P.2d 733, 738 (1985). *review denied*; State ex rel. Smits v. City of De Pere, 104 Wis.2d 26, 310 N.W.2d 607,

611-12 (1981). *See also* City of St. Louis v. Praprotnik, 485 U.S. 112, 114 (1988) (noting suspension rejected as "too harsh"). Federal employer discipline decisions may also be rejected as "too harsh". *E.g.*, Ward v. Brown, 22 F.3d 156, 519-20 (2nd Cir. 1994); Brown v. U.S. Postal Service, 860 F.2d 884, 888 (9th Cir. 1988); Boyce v. United States, 543 F.2d 1290, 1292-96 (Ct.Cl. 1976).

Reviewing bodies which deem discipline imposed by State and local employers "too harsh" compared to the misconduct or the treatment of other employes may reject that discipline. *E.g.*, Kaminsky, 559 N.E.2d at 88, 91; Community College Dist. 508 v. McKinley, 160 Ill.App.3d 916, 513 N.E.2d 951, 956, 112 Ill.Dec. 342 (1987) (discharge rejected because other workers not discharged); Massingale v. Police Bd. of City of Chicago, 140 Ill.App.3d 378, 488 N.E.2d 1289, 1292, 94 Ill.Dec. 896 (1986), *appeal denied*; Taylor v. Dep't of Health and Human Resources, 491 So.2d 752, 755-56 (La.Ct.App. 1986) (discharge arbitrary because "too harsh"); In re Kennedy, 442 So.2d 566, 569 (La.Ct.App. 1983); Walcott, 659 A.2d at 533; Town of Belleville v. Coppla, 187 N.J.Super. 147, 453 A.2d 1344, 1346 (1982); English v. College of Medicine & Dentistry of New Jersey, 73 N.J. 20, 372 A.2d 295, 296 (1977); Township of Moorestown v. Armstrong, 89 N.J.Super. 560, 215 A.2d 775, 779 (Ct.App. 1965), *certification denied*; Gallagher v. Cawley, 43 A.D.2d 931, 353 N.Y.S.2d 3, 4 (Ct. App. 1974); Brown, 635 N.E.2d at 1231; Lower Merion Township v. Turkelson, 396 Pa. 374, 152 A.2d 724, 726 (1959); Reichenbach, 417 A.2d at 1294; Smits, 310 N.W.2d at 608. *See* Ward, 22 F.3d at 519-20.

Even if public employers try to comply with the prohibition, reviewing bodies, by forcing public employers to impose proper discipline, may require pay deductions during workweeks when work is performed and jeopardize FLSA exempt status. *E.g.*, Farmers Insurance Group v. Santa Clara County, 11 Cal.4th 992, 906 P.2d 440, 445, 47 Cal.Rptr.2d 478, 483 (1995) (suspension reduced to "two days"); Walcott, 659 A.2d at 533 (discharge reduced

to 6 month suspension); Kaminsky, 559 N.E.2d at 88, 91 (court rejected discharge and, after remand, reduced two consecutive 25-day suspensions to one 30-day suspension); Town of Belleville 453 A.2d at 1346 (agency reduced discharge to 60-day suspension and court increased to 6 month suspension); Town of West New York v. Bock, 38 N.J. 500, 186 A.2d 97, 100 (1962) (suspension reduced); In re Appeal of Fuller, 25 Pa.Cmwlth 116, 358 A.2d 756, 756-58 (1976) (same); English, 372 A.2d at 296 (appellate court reduced supervisor's discharge to 1 year suspension and supreme court returned to discharge); Township of Moorestown, 215 A.2d at 779 (agency reduced discharge to 6 months suspension and court returned to discharge); Gallagher, 353 N.Y.S.2d at 4 (court reduced discharge to 30 days suspension from date of order); Brown, 635 N.E.2d at 1231 (circuit court reduced discharge to 10-day suspension, appellate court returned to discharge and supreme court reduced to 10-day suspension); Lower Merion Township, 152 A.2d at 726 (agency rejected discharge ordering reinstatement on set date without back pay); Reichenbach, 417 A.2d at 1294 (court reduced discharge to suspension declaring power to suspend at any level it "'deems proper'"); Smits, 310 N.W.2d at 608 (employer barred from suspending for "52 work weeks" since different from "one year" ordered by court). Reviewing bodies also change discipline imposed by federal employers. *E.g.*, Gulf Coast Industrial Workers Union v. Exxon Co., U.S.A., 991 F.2d 244, 247 (5th Cir. 1993) (discharge rejected and reinstatement required without backpay). As Smits notes, calculating time in "workweeks" differs from calculating time in years. 310 N.W.2d at 608. Since months often begin midweek, calculating "workweeks" and "months" also differs.

If a public employer, squeezing within the narrow confines of the prohibition, violates its duty to impose proper discipline of an exempt employe, reviewing bodies can, by requiring proper discipline, still cause a loss of exempt status. Offending employes who engage in misconduct and abuse the public trust could then receive

a windfall of back pay and future overtime from State taxpayers. As demonstrated below, the Founders never conceived the federal government could wreak such havoc.

III. Applying the prohibition to States breaches constitutional boundaries.

A. The Founders assumed it was central to any republican government to control its own workers with suspensions and pay deductions.

The Founders assumed that the republican forms of government Congress was to guarantee (U.S.Const., Art. IV, § 4) and the powers reserved to the States (U.S.Const., Amend X) included States controlling their workers through suspensions and pay deductions. They knew disciplining misconduct through monetary sanctions was central to accountability and effective government. "The power of the purse was to them the determinant of sovereignty." E. Ferguson, The Power of the Purse: A History of American Public Finance, 1776-1790 xiv-xv (1961).

The Revolution was largely a struggle over central or local control of public officials. *E.g.*, T. Draper, A Struggle for Power: The American Revolution 377-81 (1996); Nelson, *A Short, Ironic History of American National Bureaucracy*, 44 J. Politics 747, 750 (1982). The "country was conceived as much in anger as in liberty" over Britain's royal officials serving "'at colonial expense.'" Nelson at 750. The Declaration of Independence charged the King made "'judges dependent on his will alone'" for "'the amount and payment of their salaries'" and "'sent hither swarms of officers to harass our people and eat out their subsistence.'" *Id.*; A. Schlesinger, Prelude to Independence 12-13 (1958); Freytag v. C.I.R., 501 U.S.

892, 905, n. 4 (1991) (Scalia, O'Connor, Kennedy and Souter, JJ., concurring). At the time of the Revolution, the "prevalence of vice and corruption that many Americans saw in their midst" fueled "their desire to be republican" and became "perhaps in the end the most important stimulus to revolution." G. Wood, The Creation of the American Republic, 1776-1787 107 (1969).

By the mid-1600s "the distinction between local and central authority became clear" and colonial leaders wielded "every weapon" to reduce the power of royal officers. Bailyn, "Political and Social Structure in Virginia," Seventeenth Century America: Essays in Colonial History 102, 113 (J. Smith, ed. 1959). Colonies wrested some limited appointive authority from Britain. II H. Osgood, The American Colonies in the Seventeenth Century 230-31 (1904); I. Christie, Crisis of Empire: Great Britain and the American Colonies 1754-1783 20-21 (1967). Colonists knew that, even without appointive authority, controlling an official's pay controlled the official. Britain, requiring colonies to pay its appointed officials, tried to make them pay fixed amounts. *E.g.*, 1 H. Osgood, The American Colonies in the Eighteenth Century 155-56 (1924); 3 Osgood 18th at 323-24. The locally-elected assemblies assumed authority over officials by deciding when and how much they were paid. *Id.*; 4 Osgood 18th at 128. *See also* Draper at 37-41, 57-61, 172.

The assemblies developed three means to control royal officials: (a) ignoring fixed amounts Britain mandated and deciding for themselves how much to pay; (b) evaluating proper amounts after services were rendered; and (c) suspending or reducing pay in response to misconduct. 2 Osgood 18th at 132; 3 Osgood 18th at 322; 4 Osgood 18th at 53. *See* Christie at 20-21; 1 S. Morison, H. Commanger & W. Leuchtenberg, The Growth of the American Republic 84-85, 123 (6th ed. 1969). Assemblies vigorously asserted the amount and timing of those payments were their decisions. 1 Osgood 18th at 155-56; 2 Osgood 18th at 132-34, 136, 138; 3 Osgood 18th

at 215, 313, 322, 558-59; 4 Osgood 18th at 12, 20, 53, 123-24, 128, 230. Assembly members who challenged assembly efforts to control payments to officials were themselves disciplined. 2 Osgood 18th at 100.

A Massachusetts Council assistant (I Osgood 17th at 232), a New Netherlands vice-director (II Osgood 17th at 112) and a Virginia customs official (III Osgood 17th at 218) were each suspended. Militia members were fined for every training day they failed to attend. I Osgood 17th at 503 and 507. Suspensions were imposed on two North Carolina council members for misusing public funds (4 Osgood 18th at 211), five New York council members for corruption (1 Osgood 18th at 273) and a Virginia deputy auditor for dragging his feet in keeping account books (2 Osgood 18th at 242). Displeased with the Pennsylvania Governor, its assembly "stopped" his salary until he conformed. 4 Osgood 18th at 60, 66. The New York assembly, upset with a judge, "reduced" his salary. 2 Osgood 18th at 426-27, 429-30. The New York assembly reduced the pay of other officials for similar reasons. *Id.* at 430. Assemblies asked Governors to suspend other officials for misconduct. 2 Osgood 18th at 56.

From the mid-1700s forward, advocates of strong centralized government argued the power over payments to officials, which assemblies had seized, must be returned to Britain. A former governor admitted assemblies strove to control officials' pay to "prevent the misapplications of public money." T. Pownall, The Administration of the Colonies (1764) in 2 The Annals of America 98, 102 (1968). Nonetheless, he complained that assemblies having "withheld or reduced [an official's pay] on occasions where they have had reason to disapprove . . . [of] his conduct" had rendered the "officers of the Crown dependent on and governed by the assemblies." *Id.* Other governors denounced assemblies having usurped the power to discipline royal officers. 4 Osgood 18th at 143.

Britain reacted by imposing taxes under the Townshend Acts "to support the governors and judges in those colonies where assemblies wielded their power to withhold salaries as a club over royal officials." L. Gipson, The Coming of the Revolution: 1763-1775 174-75 (1954). John Dickinson, often accommodating to a fault, responded it was impossible "'to form an idea of slavery more *compleat*, more *miserable*, more *disgraceful*, than that of a people where *justice is administered*, *government exercized* . . . AT THE EXPENSE OF THE PEOPLE, and yet WITHOUT THE LEAST DEPENDENCE ON THEM'" and warned that if "'we can find no relief from this infamous situation . . . we may bow down our necks, with all the stupid serenity of servitude, to any drudgery which our lords and masters may please to command.'" B. Knollenberg, Growth of the American Revolution: 1766-1775 52 (1975). The Revolution nearly began then with cries of "taxation without representation" and claims that removing pay decisions from the colonies violated the British Constitution. Gipson at 185-86. By backing down, Britain delayed war for several years, but its intent to reassert control over officials' pay was known and the breach irreconcilable. *Id.* at 186-95; Christie at 71-78.

With independence, the newly forged States used suspensions and pay deductions to assume control over their officials. Rhode Island "pushed the [Loyalist] executive out of the way [in 1775] by suspending him from office" and later replacing him. A. Nevins, The American States During and After the Revolution, 1775-1789 80 (1924). The States each framed "Constitutions [which] made it clear that the civil officers were instruments of the whole people: 'Magistrates are their trustees and servants, and at all times amenable to them', the Virginians put it." *Id.* at 165. What was revolutionary, historians conclude, was neither the war nor anything the Continental Congress did but rather the drive by colonists to establish republican forms of government in their own States. *E.g.*, Wood, at 128 and 134 ("Nothing . . . engaged

the interests of these Americans more than the framing of these separate [State] governments" which they viewed as "'the most important [affair] that has been transacted in any nation for some centuries past'").

Madison later declared, in the Virginia ratifying convention, that the "appointment and payment of executive officers . . . was 'the most delicate part in the organization of a republican government' and 'the most difficult to establish on unexceptionable grounds.'" Wood, at 551. He defined a republican form of government as one "administered by persons holding their offices during pleasure, for a limited period, or during good behavior." The Federalist, No. 39, p. 251 (Cooke ed. 1961). He expected the national government, in setting the "tenure of the ministerial offices," to follow "the example" of the States. *Id.* at p. 253. An "example" to which Madison likely referred was the experience of his friend, Governor Thomas Jefferson, in Madison's Virginia, just a few years before the Constitutional Convention. Shortly after General Lee of Virginia was discharged by Congress,[1] Governor Jefferson analyzed whether the State Executive or State Assembly "may remove officers of the line [i.e., military officers] or staff." Jefferson, "Notes concerning the Right of Removal from Office", 4 The Papers of Thomas Jefferson: 1 October 1780 to 24 February 1781 281-82 (J. Boyd, ed. 1951). To Jefferson, the "question principally affects the Staff, whose rapacity, inattendance and means of evasion require energetic superintendence." *Id.* at 281. He concluded it implicated "Republican form

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[1]Washington charged General Lee with misconduct at the Battle of Monmouth, where many lives were lost, and Lee was suspended for a year. R. Dupuy & T. Dupuy, The Compact History of the Revolutionary War 286 (1963). After writing Congress an insulting letter, he was discharged. *Id.* Progressive discipline has a long history. I Osgood 17th at 232 (in 1630s); 2 Osgood 18th at 122 (in early 1700s); L. White, The Federalists: A Study in Administrative History 184, 425-26 (1948). (in 1790s).

and principles" for the State Executive to have power to remove Staff, if not military officers, and that, without that power, the "[c]onsequences" would be grave because the State Executive could not "dismiss nor **suspend** the most pettifogging and rascally officer." *Id.* at 282; emphasis added. Jefferson then listed professions in the Staff which had apparently required discipline during the short time he had been Governor. *Id.* at 282, text and f/n.

The new States imposed discipline on their officials before and as the Constitutional Convention was held. *E.g.*, E. Spaulding, New York in the Critical Period, 1783-1789 13 (1932) ("[r]esolutions were passed to penalize tax collectors for their delinquencies.") Maryland deducted pay from legislators, for each day absent without excuse, to control "poor attendance" and to assure public business could be conducted. C. Everstine, The General Assembly of Maryland, 1776-1850 33, 152-55 (1982). A 1783 Vermont law fined assembly members "for every day" of absence. Vermont State Papers: 1779 to 1786 446 (W. Slade ed. 1823). *See also* C. Everstine, The General Assembly of Maryland, 1634-1776 40, 41, 60, 74, 357 (1980) and J. Munroe, Colonial Delaware: A History 96 (1978) for daily pay deductions in colonial period.

Colonial practices of suspending officials, and deducting their pay, for unexcused absences and other violations of the public trust were continued. *E.g.*, Tshudy, "Compilation of Qualifications and Charges and Punishments afforded Members of the Pennsylvania House of Representatives, 1682-1980" in Report on the History of Disciplinary Actions in the Pennsylvania House of Representatives (1980). Legislators were suspended for "not upholding the responsibilities of their position." *Id.* at 4. Before 1787, more than fifty Pennsylvania legislators were "fined" for unexcused absences or tardiness. *Id.* at 1-20. Unexcused absences were even punished by members "forfeiting [their] whole wages during that sitting." *Id.* at 15.

Penalizing public servants for unexcused absences, and linking discipline power with accountability, was axiomatic. U.S.Const., Art. I, § 5, cl. 1. "Each House" of Congress was given power "to compel the Attendance of absent Members, in such manner, and **under such Penalties** as each House may provide." *Id.*; emphasis added. Madison cosponsored the motion to add this provision. 1 M. Farrand, Debates of the Convention 253-54 (rev. ed. 1937). It was "[a]greed to by all [States] except Pena. which was divided." *Id.* Ratification was furthered because the Constitution left it to each federal legislative body to "compel the attendance of its own members." 3 Farrand Debates 252. The power to decide appropriate penalties plainly lies solely with each body. Kilbourn v. Thompson, 103 U.S. 168, 190 (1880), *criticized on other grds.*, Hutcheson v. United States, 369 U.S. 599, 613 (1962). The Founders assumed each government, to account to its citizens, must control discipline within that government. Hamilton declared that a government must "promot[e] punctuality" (The Federalist, No. 75, p. 508 (Cooke ed. 1961)), that "A POWER OVER A MAN'S SUBSISTENCE AMOUNTS TO A POWER OVER HIS WILL (The Federalist, No. 79, p. 531 (Cooke ed. 1961)) and that "[t]hose who pay are the masters of those who are paid" 1 Farrand, Debates 373. The delegates, "subject to recall at any moment" by the State legislatures which appointed them (M. Farrand, The Framing of the Constitution of the United States 3, 10-11 (1913)), began the Convention by "provid[ing] agst. interruption of business by absence of members" (1 Farrand Debates 13, 15 and 17).

The Convention debated proposals to suspend impeached officials pending trial. 2 Farrand Debates 64-69, 612-13. In July 1787, eight States approved, and only two States disapproved, that proposal. *Id.* at 69. In the closing days, after the Convention carefully balanced the separation of powers, the question arose again. *Id.* at 612. Madison argued the President was already too dependent on the Legislature through its power to try an

impeached President and that an "intermediate suspension" would allow the Legislature to "make way for . . . another who will be more favorable to their views" by "vot[ing] a temporary removal of the existing Magistrate." *Id.* at 612-13. Though Madison's appeal to the countervailing interest of preserving separation of powers apparently persuaded eight States to vote against the proposal, three States still voted to suspend impeached officials pending trial. *Id.* at 612-13.

The Pinckney Plan would have granted the President, as opposed to Congress, the power to "suspend Officers, civil and military." 2 Farrand Debates 158. The Constitution remained silent and the authority to remove "'inferior officers'" of the national government was left divided between the Executive and the Legislature. *E.g.*, Freytag v. C.I.R., 501 U.S. 868, 883 (1991); Bowsher v. Synar, 478 U.S. 714, 729 (1986). It was never questioned that the federal and State governments should each have the power to discipline their own employes.

The colonies had developed governmental skills it took the fledgling federal government decades to develop.[2] Ferguson, at 48-49, 50-51, 52-53, 100-101; Gipson at 27 (as of 1763, "the ability of the colonists to manage their own governmental affairs with competence and economy is indicated on every hand by a study of local and provincial records"). Some colonies, even before 1700, "possessed all the organs of statehood" with "their own distinct executives and legislatures, their officials, courts, militia systems, their systems of revenue and expenditures, their ecclesiastical systems, and their institutions of local government." II Osgood 17th at 436-37. The States were ready to discipline their own officials as public accountability required. When the

[2]The new federal government promptly imposed disciplinary pay deductions, e.g., on postal carriers for late deliveries and on tax commissioners for missing meetings. White at 426.

colonies authorized Congress to declare independence, they expressly reserved the regulation of internal concerns. *E.g.* Editors, *The States and the Congress Move Towards Independence,* 6 Publius 135, 139, 142 (Winter 1976). The Founders would have considered it inconceivable to construe the commerce power as allowing Congress, much less a federal agency acting arbitrarily, to usurp discipline of State officials from the States.

B. Congress may not constitutionally bar States from properly suspending workers.

Congress may not constitutionally prohibit States from suspending workers commensurate with misconduct. The Founders deemed it basic to republican forms of government to control and discipline workers through their pay. The interplay between the limits of the Commerce Clause, the restraints of the Necessary and Proper Clause, the rights reserved under the Tenth Amendment and Congress's affirmative duties under the Guarantee Clause make it clear that Congress can not deprive States of those sovereign rights. U.S.Const., Art. I, § 8, cl. 3 and cl. 18, Art. IV, § 4, Amend. X.

Constitutional concerns were raised simply by Congress having extending the FLSA to the States. New York v. United States, 505 U.S. 144, 160 (1992). The appellate court below, neither noting nor analyzing any constitutional concerns, instead assumed, based on Mueller, that the USDOL prohibition was valid in the public sector. Auer, 65 F.3d at 710, n. 6. Mueller, in turn, dismissed constitutional concerns by asking why States, retaining other disciplinary "options", do not surrender, to the will of USDOL, their power to impose proper discipline. 54 F.3d at 442-43. The correct focus is that the constitutional provisions involved preclude a statute, not to mention a USDOL interpretation, from forcing States to surrender a reserved power (U.S.Const.,

Amend. X) which Congress must affirmatively protect (U.S.Const., Art. IV, § 4). If a federal agency, through a non-regulatory interpretation the judiciary declines to question, is able to force a State to impose arbitrary discipline, the surrender would be complete. States could thereafter maintain their disciplinary structures only at the unmonitored whim of those federal agencies.

Constitutional concerns may not be dismissed because State employers have disciplinary "options" other than the suspensions USDOL allows. A demonstration may not be prohibited because the demonstrators have a printing press. Blacks may not be barred from a white school because a black school also exists. USDOL, under the FLSA, may not require States to forego proper discipline in favor of improper alternatives. To say "other options" exist is no answer to constitutional concerns.

Until the Court "more recently departed" in Garcia from its traditional approach, the Court had, in examining if States may be subjected to generally applicable federal statutes, balanced federal interests against "the degree to which such laws would prevent the State from functioning as a sovereign; that is, the extent to which such generally applicable laws would impede a state government's responsibility to represent and be accountable to the citizens of the State." New York, 505 U.S. at 177. In the present case, an application of the statute Garcia sanctioned, the FLSA, returns for deeper consideration.

Garcia concluded that the political process, not courts, should detect and enforce lines dividing mandates to States permissible under the Commerce Clause and impermissible under the Tenth Amendment. 469 U.S. at 553-54. It turned on the premise that "[t]he political process ensures that laws that unduly burden the States will not be promulgated." *Id.* at 555-56. The Court now realizes this premise, outdated when pronounced (*e.g.*, Pittinger, "*Garcia* and the Political Safeguards of Federalism: Is There a Better Solution to the Conundrum

of the Tenth Amendment", 22 Publius 1-19 (Winter 1992)), is a meager safeguard for State sovereignty. *E.g.*, New York, 505 U.S. at 159, 177; U.S. Term Limits v. Thornton, 115 S.Ct. 1842, 1852-60 (1995); and *id.*, 115 S.Ct. 1872-75 (1995) (Kennedy, J., concurring). *See* New York, 505 U.S. 188, 202 (1995) (White, Blackmun & Stevens, JJ., concurring and dissenting) construing New York as being at odds with this premise in Garcia.

Even this meager safeguard vanishes unless, in examining the extension of generally applicable federal statutes to States, courts are:

> absolutely certain that Congress intended such an exercise [of its powers]. "[T]o give the state-displacing weight of federal law to mere congressional ambiguity would evade the very procedure for lawmaking on which *Garcia* relied to protect states' interests." [Citation omitted.]

Gregory v. Ashcroft, 501 U.S. 452, 464 (1991). A court examining if Congress intended to apply the disciplinary deduction prohibition to public employers would be hard pressed to be "absolutely certain" Congress intended to exercise its powers in that manner. *Id.* Simply applying Garcia, with the Gregory admonition, would render the prohibition invalid as to public employers.

This rule of statutory construction is vitally important. The accountability of federal and state workers to their respective citizenries must be kept separate and clear. New York, 505 U.S. at 168-69, 182-83. If federal overreaching forces a State action, the accountability of both State and federal governments are improperly curtailed because citizen anger is misdirected. *Id.* If a federal agency forces States to impose improper discipline, the instigator, the federal agency, may escape citizen reaction. If a State loses litigation challenging that improper discipline, adverse reaction will focus on

the State, not the federal, government. If a State, because it imposed proper discipline contrary to USDOL whim, must treat its executives and professionals as overtime employes and pay out millions of dollars, citizens will direct anger towards the State government.

Respecting State sovereignty bolsters the vitality of the federal government. Dual sovereignties are intended to create competing healthy governments which motivate workers to perform well for the public. Yarbrough, "Federalism in the Foundation and Preservation of the American Republic", 6 Publius 43, 55 (1976). If any competing government becomes anemic, the people suffer. *Id.*; New York, 505 U.S. at 181-82.

The federal government abridges federalism if it micromanages how a State or local employer disciplines workers even in addressing, through granted powers, the imposition of improper discipline. Rizzo v. Goode, 423 U.S. 362, 369-70, 379-80 (1976). Penalizing States for properly disciplining their workers bleeds the core of State governance more directly than in areas this Court protects from Commerce power intrusion. *Compare* pp. 15-23 *supra* with United States v. Lopez, 115 S.Ct. 1624 (1995). *See* "Symposium: Reflections on United States v. Lopez," 94 Mich.L.Rev. 533-831 (December 1995). Lopez noted Garcia and earlier decisions on extending the FLSA to public employers had cautioned both that the Commerce power had limits and that, in analyzing each exercise, the scope of those limits is "'necessarily one of degree.'" 115 S.Ct. at 1629 and 1633. The Commerce power may not "'effectually obliterate the difference between what is national . . . and local and create a centralized government.'" *Id.* at 1629.

Had the realities State and local employers now experience been presented as a hypothetical, it may have been viewed as among those "horrible possibilities that never happen in the real world." Garcia, 469 U.S. at 556. This view is not new. Hamilton dismissed State concerns

arguing the "moment we launch into conjectures about the usurpations of the federal government, we get into an unfathomable abyss, and fairly put ourselves out of the reach of all reasoning." The Federalist Papers, No. 31, p. 197 (Cooke ed. 1961).[3] In the more concrete and sharpened context presented here, the political process seems a less dependable watchdog over State sovereignty.

The Court may conclude the premise that the political process protects State sovereignty bears reconsideration. The structure of federalism is not self-perpetuating:

> Federalism was our Nation's own discovery. The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other.

Term Limits, 115 S.Ct. at 1872 (Kennedy, J., concurring). Atoms, and sovereignties, which share space do not remain "split" without vigilance. Dominant elements, and dominant sovereignties, naturally tend to control those with less power. The federal government, merely by exercising power, tends to absorb State sovereignty even if that is not its intent. This Court should monitor exercises of federal power, with at least the same careful scrutiny it gives to other constitutional guarantees, to assure the "atom of sovereignty" remains split.

While the facts in New York did not then justify reevaluation of Garcia, the Court held the confines imposed on the Commerce power by the Necessary and Proper Clause (U.S.Const., Art. I, § 8, cl.18) must always

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[3]Hamilton's "federalist" views should be approached with caution. He startled the Convention by proposing to **entirely** eliminate State sovereignty. 1 Farrand, Debates 294-301.

be considered and "a particularly strong federal interest" identified. 505 U.S. at 158-59 and 178. Yet only the Garcia dissenters asked whether extending the FLSA to States was necessary to a federal governmental power and they concluded it was not. Garcia, 469 U.S. at 557, 563, n. 11 (Powell, J., Rehnquist, Burger, C.J., & O'Connor, J. dissenting); *Id.*, 469 U.S. at 580, 584-86 (O'Connor, Powell, & Rehnquist, JJ., dissenting). A reanalysis of Garcia's result may be appropriate, in light of New York, to determine whether extending the FLSA to State and local employers was necessary to serve any particularly strong federal interest. Without revisiting Garcia at all, however, the Court could conclude it is not necessary to any particularly strong federal interest to prohibit States from imposing proper discipline on their workers. New York, 505 U.S. at 158-59 and 178.

The continuing vitality of federalism, which must depend on this Court for protection, may require a broader inquiry. On the "unsteady path" the Court has traveled in analyzing the extension of the FLSA to States, it has been directed to the passive restraints of the Tenth Amendment. *Id.* at 160. Congress also has an affirmative duty to assure States have republican forms of government (U.S.Const. Art. IV, § 4). *E.g.*, Highland Farm Dairy v. Agnew, 300 U.S. 608, 612 (1937). New York noted the confines the Guarantee Clause imposes on Congress's mandates on State government while finding no application there because Congress merely offered monetary incentives to the States. 505 U.S. at 183-85. The "choice" presented to States through the prohibition, to surrender control of discipline or pay overtime to all executives and professionals, is not a mere incentive.

If courts, leaving the Tenth Amendment to the political process and deferring to irrational agency interpretations, consider "nonjusticiable" this affirmative duty under the Guarantee Clause, all meaningful judicial monitoring of the federalist balance is abandoned. The Court hesitates to referee internal political disputes

between warring factions within a State (New York, 505 U.S. at 183-85), but the Guarantee Clause has the added purpose of requiring Congress, exercising its powers, not to obstruct States in operating their own chosen "republican forms of government" and, in that area, courts are the proper arbiters of where federal authority stops and State authority is preserved (*id.*).

The Court could, more narrowly, merely find that Congress did not intend to breach its duties under the Guarantee Clause. *E.g.*, Minor v. Happersett, 88 U.S. 162, 175-76 (1874) (determining intent is not deciding internal political questions). Courts should first determine a statutory interpretation "does not raise serious constitutional concerns." Edward J. DeBartolo Corp. v. Fla. Gulf Coast Tr. Coun., 485 U.S. 568, 577 (1988). Applying the prohibition to States raises serious constitutional concerns under both the Tenth Amendment and the Guarantee Clause. Without an "'affirmative intention of the Congress clearly expressed'" which requires an interpretation fraught with unconstitutional implications, courts, for that reason alone, reject it as presumptively contrary to Congressional intent. NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 507 (1979). If the Tenth Amendment or the Guarantee Clause are beyond judicial cognizance even in determining Congressional intent, the careful federalist structure created by the Founders is lost. Just as "no constitutional guarantee enjoys preference, so none should suffer subordination or deletion." Ullman v. United States, 350 U.S. 422, 428 (1956). Appointing Congress to police itself in not consuming the Tenth Amendment, declaring the Guarantee Clause beyond judicial visibility and deferring to irrational agency interpretations would subordinate or delete Constitutional guarantees of State powers.

Public employers must respond appropriately to misconduct by their workers. "The danger to liberty, the danger of mal-administration, has not yet been found to lie so much in the faculty of introducing improper persons

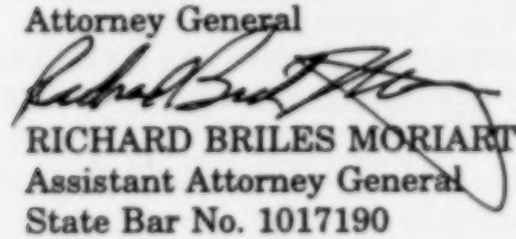
into office as in the difficulty of displacing those who are unworthy of public trust." J. Madison, 1 Annals of Congress 496 (J.Gales ed. 1789). Congress did not intend, and could not have intended, to drive States towards those dangers and deprive States of the ability to be accountable to their own citizens.

CONCLUSION

The judgment of the appellate court should be affirmed. The Court should clarify that the disciplinary deduction prohibition is not valid in the public sector.

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CONSTITUTIONAL PROVISIONS

Article I, Section 5, of the United States Constitution provides, in relevant part:

> Each House . . . may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.

Article I, Section 8, of the United States Constitution provides, in relevant part:

> The Congress shall have power
>
> . . . .
>
> To regulate Commerce . . . among the several States, ...
>
> . . . .
>
> To make all laws which shall be necessary and proper for carrying into Execution the foregoing Powers, ...

Article IV, Section 4, of the United States Constitution provides, in relevant part:

> The United States shall guarantee to every State in this Union a Republican Form of Government . . . .

Article X of the Amendments to the United States Constitution provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Article XIV, Section 1, of the Amendments to the United States Constitution provides, in relevant part:

> . . . No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

UNITED STATES STATUTES

2 U.S.C. § 60-1 states, in relevant part:

> § 60-1. Authority of officers of the Congress over Congressional employees
>
> **(a) . . . discipline**
>
> Each officer of the Congress having responsibility for the supervision of employees, . . . shall have authority--
>
> . . . .
>
> (2) to remove or otherwise discipline any employee under his supervision.

5 U.S.C. Part 3, Ch. 75 (Adverse Actions) provides, in relevant part:

> SUBCHAPTER I--SUSPENSIONS FOR 14 DAYS OR LESS
>
> **§ 7501. Definitions**
>
> For the purpose of this subchapter--
>
> (1) "employee" means an individual in the competitive service [continuously employed for one year and who is not on probation].
>
> (2) "suspension" means the placing of an employee, for disciplinary reasons, in a temporary status without duties and pay.

> **§ 7502. Actions covered**
>
> This subchapter applies to a suspension for 14 days or less, [with exceptions covered by other provisions].
>
> **§ 7503. Cause and procedure**
>
> (a) . . . , an employee may be suspended for 14 days or less for such cause as will promote the efficiency of the service (including discourteous conduct to the public confirmed by an immediate supervisor's report of four such instances within any one-year period or any other pattern of discourteous conduct).
>
> . . . .
>
> SUBCHAPTER II-- . . . SUSPENSIONS FOR MORE THAN 14 DAYS . . . .
>
> **§ 7511. Definitions; application**
>
> (a) For the purpose of this subchapter–
>
> (1) "employee" [with exceptions in 29 U.S.C. § 7511(b)] means–
>
> (A) an individual in the competitive service [continuously employed for one year and who is not on probation]; and
>
> (B) a preference eligible [as specified who] completed 1 year of current continuous service in the same or similar positions;
>
> (2) "suspension" has the meaning as set forth in section 7501(2) of this title;
>
> . . .
>
> **§ 7512. Actions covered**
>
> This subchapter applies to–
>
> . . .
>
> (2) a suspension for more than 14 days [with exceptions covered by other provisions];
>
> . . .

§ 7513. Cause and procedure

(a) . . . an agency may take an action [such as suspension for 14 days or less] for such cause as will promote the efficiency of the service.

. . .

SUBCHAPTER III–
ADMINISTRATIVE LAW JUDGES

§ 7521. Actions against administrative law judges

. . . .

(b) [authorizing suspensions of administrative law judges].

. . . .

SUBCHAPTER IV–NATIONAL SECURITY

. . . .

§ 7532. Suspension and removal

(a) Notwithstanding other statutes, the head of an agency may suspend without pay an employee of his agency when he considers that action necessary in the interests of national security. . . .

. . . .

SUBCHAPTER V–SENIOR EXECUTIVE SERVICE

§ 7541. Definitions

(a) For the purpose of this subchapter–

(1) "employee" means a career appointee in the Senior Executive Service who [has completed probation and was covered by subchapter II immediately before appointment to the Senior Executive Service.]

(2) "suspension" has the meaning as set forth in section 7501(2) of this title.

§ 7542. Actions covered

This subchapter applies to a . . . suspension for more than 14 days [with exceptions covered by other provisions].

§ 7543. Cause and procedure

(a) . . . an agency may take an action [such as suspension for more than 14 days] only for such cause as will promote the efficiency of the service.

. . . .

29 U.S.C. § 203, as amended in 1974, states, in relevant part:

§ 203. Definitions

As used in this chapter–

. . . .

(c) "State" means any State of the United States . . .

(d) "Employer" includes . . . a public agency . . . .

(e)(2) In the case of an individual employed by a public agency, ["employe"] means–

. . . .

(C) any individual employed by a State . . . [with narrow exceptions]

. . . .

(x) "Public agency" means . . . the government of a State . . . [or] a State . . . .

29 U.S.C. § 207(a)(1) provides, in relevant part:

(a)(1) . . . [N]o employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

29 U.S.C. § 213(a) provides, in relevant part:

> **(a)** The provisions of section[] . . . 207 of this title shall not apply with respect to—
>
> **(1)** any employee employed in a bona fide executive, administrative, or professional capacity, . . . (as such terms are defined and delimited from time to time by regulations of the Secretary [of USDOL], subject to the provisions of [the Administrative Procedures Act, 5 U.S.C. §§ 551-559] . . .); . . .

UNITED STATES REGULATIONS INVOLVED

5 C.F.R. Part 551, Subpart B—promulgated by the Civil Service Commission and later adopted by its successor, the Office of Personnel Management—provides:

SUBPART B—EXEMPTIONS

§ 551.201 Agency authority.

The employing agency shall exempt from the overtime provisions of the Act any employee who meets the exemption criteria of this subpart and such supplemental interpretations or instructions as shall be issued by the Office of Personnel Management.

§ 551.202 General principles governing exemptions.

In all exemption determinations, the agency shall observe the principles that-

(a) Exemption criteria shall be narrowly construed to apply only to those employees who are clearly within the terms and spirit of the exemption.

(b) The burden of proof rests with the agency that asserts the exemption.

(c) All employees who clearly meet the criteria for exemption must be exempted.

§ 551.203 Exemption of General Schedule employees.

(a) Any employee properly classified at GS-4 or below (or the equivalent level in other white collar pay systems) shall be nonexempt;

(b) Any employee properly classified at GS-5 through GS-10 (or the equivalent level in other white collar pay systems) shall be exempt only if the employee is an executive, administrative, or professional employee as defined in §§ 551.204, 551.205, and 551.206 of this subpart.

§ 551.204 Executive exemption criteria.

An "executive" employee is a supervisor, foreman, or manager who manages a Federal agency or any subdivision thereof (including the lowest recognized organizational unit with a continuing function) and regularly and customarily directs the work of at least three subordinate employees (excluding support employees) and meets all the following criteria:

(a) The employee's primary duty consists of management or supervision. The primary duty requirement is met if the employee--

(1) Has authority to select or remove, and advance in pay and promote, or make any other status changes of subordinate employees, or has authority to suggest and recommend such actions with particular consideration given to these suggestions and recommendations; and

(2) Customarily and regularly exercise discretion and independent judgment in such activities as work planning and organization; work assignment, direction, review, and evaluation; and other aspects of management of subordinates, including personnel administration.

(b) In addition to the primary duty criterion that applies to all employees, foreman level supervisors in the Federal Wage System (or the equivalent in other wage systems), employees at the GS-7 through GS-9 level subject to section 207(k) of Title 29, United States Code, and employees classified at the GS-5 or GS-6 level (or equivalent in other white collar pay systems) must spend 80 percent or more of the worktime in a representative workweek on supervisory and closely related work.

§ 551.205 Administrative exemption criteria.

. . .

§ 551.206 Professional exemption criteria

A professional employee is an employee who meets all of the following criteria, or any teacher who is engaged in the imparting of knowledge or in the administration of an academic program in a school system or educational establishment.

(a) The employee's primary duty consists of -

(1) Work that requires knowledge in a field of science or learning customarily and characteristically acquired through education or training that meets the requirements for a bachelor's or higher

degree, with major study in or pertinent to the specialized field as distinguished from general education; or is performing work, comparable to that performed by professional employees, on the basis of specialized education or training and experience which has provided both theoretical and practical knowledge of the specialty, including knowledge of related disciplines and of new developments in the field; or

(2) Work in a recognized field of artistic endeavor that is original or creative in nature (as distinguished from work which can be produced by a person endowed with general manual or intellectual ability and training) and the result of which depends of the invention, imagination, or talent of the employee.

(b) The employee's work is predominantly intellectual and varied in nature, requiring creative, analytical, evaluative, or interpretative thought process for satisfactory performance.

(c) The employee frequently exercises discretion and independent judgment, under only general supervision, in performing the normal day-to-day work.

(d) In addition to the primary duty criterion that applies to all employees, General Schedule employees classified at GS-5 or GS-6 (or the equivalent in other systems), must spend 80 percent or more of the worktime in a representative workweek in professional functions and work that is an essential part of those functions.

29 C.F.R. § 541.1—promulgated by USDOL—provides, in relevant part:

§ 541.1 Executive.

The term "employee employed in a bona fide executive . . . capacity" in [29 U.S.C. § 213(a)(1)] shall mean any employee:

(a) [through (e) detail criteria as to duties.]; and

(f) Who is compensated for his services on a salary basis at a rate of not less than $155 per week . . . , exclusive of board, lodging, or other facilities: *Provided* [that an employe compensated on a salary basis at not less than $250 per week is presumed to meet certain of the above duties criteria]

29 C.F.R. § 541.3—promulgated by USDOL—provides, in relevant part:

§ 541.3 Professional.

The term employee *employed in a bona fide . . . professional . . . capacity* in [29 U.S.C. § 213(a)(1)] shall mean any employee:

(a) [through (e) detail criteria as to duties.]; and

(e) Who is compensated for services on a salary or fee basis at a rate of not less than $170 per week . . . exclusive of board, lodging, or other facilities: *Provided*, [that an employe compensated on a salary or fee basis at not less than $250 per week is presumed to meet certain of the above duties criteria].

29 C.F.R. § 541.5d—promulgated by USDOL and effective September 18, 1992 (57 Fed. Reg. 37666 and 37677)—provides:

§ 541.5d Special provisions applicable to employees of public agencies.

(a) An employee of a public agency who otherwise meets the requirements of § 541.118 shall not be disqualified from exemption under § 541.1, 541.2, or 541.3 on the basis that such employee is paid according to a system established by statute, ordinance, or regulation, or by a policy or practice established pursuant to principles of public accountability, under which the employee accrues personal leave and sick leave and which requires the public agency employee's pay to be reduced or such employee to be placed on leave without pay for absences for personal reasons or because of illness or injury of less than one work-day when accrued leave is not used by an employee because—

(1) permission for its use has not been sought or has been sought and denied;

(2) accrued leave has been exhausted; or

(3) the employee chooses to use leave without pay.

(b) Deductions from the pay of an employe of a public agency for absences due to a budget-required furlough shall not disqualify the employee from being paid "on a salary basis" *except* in the workweek in which the furlough occurs and for which the employe's pay is accordingly reduced.

OTHER MATERIALS

29 C.F.R. § 541.118–issued by USDOL–provides, in relevant part:

> **§ 541.118 Salary basis.**
>
> (a) An employee will be considered to be paid "on a salary basis" within the meaning of the regulations if under his employment agreement he regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his compensation, which amount is not subject to variations in the quality or quantity of the work performed. Subject to the exceptions provided below, the employee must receive his full salary for any week in which he performs any work without regard to the number of days or hours worked. This policy is also subject to the general rule that an employee need not be paid for any workweek in which he performs no work.
>
> . . .
>
> (5) Penalties imposed in good faith for infractions of safety rules of major significance will not affect the employee's salaried status. Safety rules of major significance include only those relating to the prevention of serious danger to the plant, or other employees, such as rules prohibiting smoking in explosive plants, oil refineries, and coal mines.
>
> (6) The effect of making a deduction which is not permitted under these interpretations will depend upon the facts in the particular case. Where deductions are generally made where there is no work available, it indicates there was no intention to pay the employee on a salary basis. In such a case the exemption would not be applicable to him during the entire period when such deductions were being made. On the other hand, where a deduction not permitted by these interpretations is inadvertent, or is made for reasons other than lack of work, the exemption will not be considered to have been lost if the employer reimburses the employee for such deductions and promises to comply in the future.
>
> . . .

H. Weiss, Report and Recommendations on Proposed Revisions of Regulations, Part 541 24-26 (USDOL June, 1949) (the Weiss Report) states, in relevant part:

> . . .
>
> The notice of hearing invited evidence on the need for revision or definition of the term "on a salary . . . basis." . . . The evidence at hearing showed clearly that bona fide executive, administrative, and professional employees are almost universally paid on a salary or fee basis. Compensation on a salary basis appears to have been almost universally recognized as the only method of payment consistent with the status implied by the term "bona fide" executive. Similarly, payment on a salary (or fee) basis is one of the recognized attributes of administrative and professional employment. The proposals to eliminate the requirement and to apply an hourly rate or average earnings test may therefore be rejected as inconsistent with true executive, administrative or professional status.
>
> A number of questions have arisen in the past in connection with the interpretation of the phrase "on a salary . . .

basis" particularly with respect to the effect of deductions on the salaried status of an employee. The problem became of some importance during the war when the practice of making such deductions was adopted by some companies engaged in war production as a disciplinary measure to discourage absenteeism among executive and administrative employees. This practice raised serious questions as to whether any employees to whom it was applied were actually employed "on a salary . . . basis" in accordance with the provisions of the regulations. Investigation by the Divisions indicated that this changed practice had become sufficiently widespread to warrant the conclusion that the wartime industrial practice differed from the pre-war practice and that such disciplinary deductions were no longer inconsistent with payment "on a salary . . . basis." In an effort to meet the wartime problems and to clarify the meaning of the term "on a salary . . . basis" the Divisions issued a restatement of position, the pertinent portion of which follows:

> . . . [T]he fact that less than [an exempt's employee's predetermined amount] is paid for a particular pay period because disciplinary deductions are made for unreasonable absences would not in itself prove that the employee is not employed on a salary basis. [Nonetheless, exempt employes must be given more latitude in taking absences than non-exempt employees.]

As a result of this statement of position, the problems created by the peculiar wartime conditions in many plants were solved but as an incident thereof, numerous administrative difficulties were encountered. For example, employers as well as the Divisions were faced with the need for determining in particular cases whether absences were reasonable or unreasonable and whether unreasonable absences included absences for longer periods than were allowed under established company plans for sick leave and "annual" leave. Since the answer to this latter question was determined to depend upon the reasonableness of the particular leave plan, employers had to decide for themselves and the Divisions in many instances were compelled to rule on specific leave plans to determine whether the leave plans were "reasonable" in nature. Employers were thus subject to considerable uncertainty prior to obtaining the opinion of the Divisions and the Divisions were faced with an undesirable administrative burden given such opinions. In my opinion, moreover, the building of such an elaborate structure of interpretation upon the simple phrase "on a salary . . . basis" should be avoided if possible in the interests of good administration.

The testimony at the hearings indicated that the practice of disciplining bona fide executive, administrative, and professional employees by making deductions from their salaries had been a wartime phenomenon, resulting from rapid upgrading, the pressure of long hours, and other temporary conditions. Such deductions are rarely made today. The

disciplining of such employees in the rare instances where it is needed is usually accomplished in other ways than by deductions from salary. There appears to be no present need for a definition of "salary basis" as difficult to apply as the one now followed by the Divisions, particularly since it is not consistent with the common understanding of the phrase as it applies to bona fide executive, administrative, and professional employees. In view of the changed conditions, payment of anything less than the full salary seemed to cast doubt upon the bona fide character of the employee's executive, administrative, and professional status.

. . .

14 Fed. Reg. 7703 and 7735 (December 28, 1949)—published by USDOL to create 29 C.F.R. § 541.118 and other "interpretations"—states, in relevant part:

TITLE 29—LABOR

. . .

PART 541— . . .

INTERPRETATIONS OF REGULATIONS

. . .

. . . [Revisions of the regulations were published on December 24, 1949 as 29 C.F.R. Part 541, Subpart A.] For the purpose of outlining and explaining the application of these regulations to specific types of situations, an explanatory bulletin has been prepared which interprets these regulations in the light of their application to specific factual situations. This explanatory bulletin contains statements of general policy and interpretations directly related to the regulations . . . . The text of such explanatory bulletin [quoting § 541.118 in its entirety] is as follows:

SUBPART B—INTERPRETATIONS

. . .

§ 541.118 *Salary basis.* (a) An employee will be considered to be paid on a salary basis within the meaning of the regulations in Subpart A of this part, if under his employment agreement he regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the workweek or in the quality or quantity of the work performed. The employee must receive his full salary for any week in which he performs any work without regard to the number of days or hours worked.

(b) *Minimum guarantees plus extras.* It should be noted that the salary may consist of a predetermined amount constituting all or part of the employee's compensation. In other words, additional compensation besides the salary is not inconsistent with the salary basis of payment. The requirement will be met, for example, by a branch manager who receives a salary of $55 or more a week and, in addition, a commission of 1 percent of the branch sales. The requirement will also be met by a branch manager who receives a percentage of the sales or profits of his branch, if the employment arrangement also includes a guarantee of at least the minimum weekly salary (or the equivalent for a monthly or other period) required by the regulations in Subpart A of this part. Another type of situation in which the requirement will be met is that of an employee paid on a daily or shift basis, if

the employment arrangement includes a provision that he will receive not less than the amount specified in the regulations in Subpart A of this part in any week in which he performs any work. The test of payment on a salary basis will not be met, however, if the salary is divided into two parts for the purpose of circumventing the requirement of payment "on a salary basis". For example, a salary of $100 may not arbitrarily be divided into a guaranteed minimum of $55 paid in each week in which any work is performed, and an additional $45 which is made subject to deductions.

(c) *Initial and terminal weeks.* Failure to pay the full salary in the initial or terminal week of employment is not considered inconsistent with the salary basis of payment. For this purpose, an extended voluntary leave of absence may be considered to come within this rule. In such weeks the payment of a proportionate part of the employee's salary for the time actually worked will meet the requirement. However, this should not be construed to mean that an employee is on a salary basis within the meaning of the regulations in Subpart A of this part if he is employed occasionally for a few days and is paid a proportionate part of the weekly salary when so employed. Moreover, even payment of the full weekly salary under such circumstances would not meet the requirement, since casual or occasional employment for a few days at a time is inconsistent with employment on a salary basis within the meaning of the regulations in Subpart A of this part.

19 Fed. Reg. 1321-1322 (March 9, 1954)—published by USDOL as to 29 C.F.R. § 541.118—states, in relevant part:

COMPENSATION "ON A SALARY BASIS"

Notice is hereby given that [USDOL] proposes to amend § 541.118 of Part 541, Subpart B (29 C.F.R. Part 541), as follows:

. . .

(5) . . . Penalties imposed in good faith for infractions of safety rules, or for other major disciplinary reasons, will not affect the employee's salaried status.

. . .

Prior to the final adoption of the proposed amendment set forth above, consideration will be given to any views, arguments or data pertaining thereto [submitted to USDOL] within 30 days [of publication].

19 Fed. Reg. 4405-4406 (July 17, 1954)—published by USDOL as to 29 C.F.R. § 541.118—states, in relevant part:

COMPENSATION "ON A SALARY BASIS"

. . .

The comments [received in response to the March 9, 1954 notice] have been carefully considered. On the basis of the comments, the provision that penalties may be imposed for major disciplinary reasons has been deleted, and the provision regarding penalties for infractions of safety rules has been clarified. The modified language will be found in § 541.118(a)(5). In all other respects, the amendment is adopted as proposed.

. . .

(5) Penalties imposed in good faith for infractions of safety rules of major significance will not affect the employee's salaried status. Safety rules of major significance include only those relating to

the prevention of serious danger to the plant or other employes, such as rules prohibiting smoking in explosive plants, oil refineries, and coal mines.

40 Fed. Reg. 27640 to 27641—published by the Civil Service Commission to create 5 C.F.R. Part 551 (Pay Administration Under the Fair Labor Standards Act) effective July 1, 1975—stated:

PART 551—PAY ADMINISTRATION UNDER THE FAIR LABOR STANDARDS ACT

Exemptions

A new Part 551 is being added to Chapter I of 5 CFR, under [29 U.S.C. § 204(f)] as amended by Pub. L. 93-259 enacted April 3, 1974, which states:

> Notwithstanding any other provision of this Act, or any other law, the Civil Service Commission is authorized to administer the provisions of this Act with respect to any individual employed by the United States (other than any individual employed by the United States Library of Congress, United States Postal Service, Postal Rate Commission, or the Tennessee Valley Authority).

Partial regulations governing exemptions are issued at this time, with regulations on other aspects to follow.

These regulations are issued without prior publication in proposed form. Because this is a matter relating to agency management and personnel practices, the provisions of the Administrative Procedure Act (now codified in 5 U.S.C. 553) concerning notice of proposed rule-making, opportunity for public participation, and delay in effective date are inapplicable.

The Civil Service Commission has, however, provided opportunity for all interested parties, including Federal agencies and employee organizations, and the public to comment on the issues covered by the exemption regulations. This opportunity was provided through circulation, in July 1974, to Federal agencies and unions representing Federal employees, of a draft proposing expansion of the interim instruction on exemption criteria with a request for comment, and through a formal public hearing notice of which was published on September 16, 1974 in the Federal Register (39 FR 33255).

The comments received reflected widely divergent views concerning the exemption criteria. The Commission has resolved the issues raised in terms of the policy of integrating exemption criteria with Federal classification systems to the extent possible, while maintaining results consistent with the exemption criteria applied by the Department of Labor.

In accordance with the foregoing, Chapter I of Title 5 of the Code of Federal Regulations is amended by adding a new Part 551, reading as follows:

[promulgating regulations in essentially the same format as the present regulations by the Commission's successor, the Office of Personnel Management, at 5 C.F.R. Part 551, Subpart B.]

50 Fed. Reg. 47696-47997 (November 19, 1985)—published by USDOL as to 29 C.F.R. Part 541—states, in relevant part:

SUMMARY: The Wage and Hour Division is considering proposing revisions [to 29 C.F.R. Part 541] . . . . Comments are invited concerning the current definitions of terms relating to the salary, duties, and responsibilities tests for [exempt] employees, as well as the interpretations of such definitions.

. . .

Accordingly, comments are sought from interested parties concerning the matters set forth below, as well as any other issues of interest under this regulation.

I. Salary Tests.

. . . Comments are sought with respect to the following matters related to the salary tests:

. . .

2. Should the salary tests be eliminated? If so, what tests should [USDOL] rely on to determine applicability of the 29 U.S.C. § 213(a)(1)] exemption? What would be the economic impact of the elimination of the salary tests?

. . .

10. Should [USDOL] recognize individual State and local government civil service systems for classifying [executive, professional and administrative] employees in applying the exemption to employees of such governments? Such recognition would not alter the traditional FLSA principle that an employer who claims an exemption under the Act has the burden of showing that it applies.

Colorado Senate Bill 96-021, as enacted April 8, 1996, provides:

1996

An Act

SENATE BILL 96-021

BY SENATORS Hernandez, R. Powers, Thiebaut, and Johnson;
also REPRESENTATIVES Acquafresca, Anderson, Friednash, Prinster, and Clarke.

CONCERNING THE PENALTY ASSESSED TO SUPERVISORS IN THE STATE PERSONNEL SYSTEM FOR FAILURE TO COMPLETE MANDATORY ANNUAL PERFORMANCE EVALUATIONS.

Be it enacted by the General Assembly of the State of Colorado:

SECTION 1. 24-50-118 (3) (a) and (4), Colorado Revised Statutes, 1988 Repl. Vol., as amended, are amended to read:

24-50-118. Service and performance evaluations - system and use. (3) (a) A supervisor, which for purposes of this section shall include exempt supervisors of classified employees, who does not evaluate his OR HER subordinate employees, as provided in this section, on at least an annual basis shall be ~~fined an amount not less than the equivalent of three days' salary~~ SUSPENDED FROM WORK WITHOUT PAY FOR A PERIOD OF NOT LESS THAN ONE WORKWEEK.

(4) The state personnel director shall monitor compliance with subsection (3) of this section and shall report ~~his~~ THE DIRECTOR'S findings annually on January 1 to the joint budget committee of the general assembly. Said report shall include: The number of supervisors who were demoted or terminated, and the percentage of all supervisors who acted in compliance with this section.

Capital letters indicate new material added to existing statutes; dashes through words indicate deletions from existing statutes and such material not part of act.

SECTION 2. Safety clause. The general assembly hereby finds, determines, and declares that this act is necessary for the immediate preservation of the public peace, health, and safety.

/s/
Tom Norton
PRESIDENT OF
THE SENATE

/s/
Charles E. Berry
SPEAKER OF THE HOUSE
OF REPRESENTATIVES

/s/
Joan M. Albi
SECRETARY OF
THE SENATE

/s/
Judith M. Rodriguez
CHIEF CLERK OF
THE HOUSE OF
REPRESENTATIVES

APPROVED August 8, 1996 at 10:47 a.m.

/s/
Roy Romer
GOVERNOR OF THE STATE
OF COLORADO

(20)

No. 95-897

Supreme Court, U.S.
FILED
OCT 11 1996
OFFICE OF THE CLERK

SUPREME COURT OF THE UNITED STATES
October Term, 1996

FRANCES BERNARD AUER, et al.,

Petitioners,

- against -

DAVID A. ROBBINS, et al., etc.,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF OF AMICUS CURIAE CITY OF NEW YORK ON BEHALF OF RESPONDENTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF AMICUS CURIAE 1

THE SALARY BASIS TEST SHOULD RECEIVE ON JUDICIAL REVIEW ONLY SUCH DEFERENCE AS ITS PERSUASIVENESS PERMITS. 3

NEITHER PETITIONERS NOR EVEN THE DEPARTMENT OF LABOR ARGUES FOR A STRICT READING OF THE SALARY BASIS TEST. 4

THIS COURT SHOULD HOLD THAT WHERE A DEDUCTION NOT PERMITTED BY THE SALARY BASIS TEST OCCURS, THE EXEMPTION IS LOST ONLY FOR THAT EMPLOYEE AND ONLY FOR THE WORKWEEK IN WHICH THE DEDUCTION IS MADE. 6

THIS COURT MUST BE AWARE THAT ITS HOLDING ON THE MEANING OF THE PHRASE "SUBJECT TO" MAY WELL BE APPLIED BY THE LOWER COURTS TO DEDUCTIONS FOR COURT APPEARANCES AND TEMPORARY MILITARY LEAVE AS WELL AS DEDUCTIONS AS DISCIPLINARY SANCTIONS. 11

TABLE OF AUTHORITIES

Cases

Abshire v. County of Kern,
908 F2d 483 (9th Cir, 1990),
cert. denied, 498 US 1068 (1991) 4

Chevron U.S.A., Inc. v. Natural Resources
Defense Council, 467 US 837 (1984) 7

LaChappelle v. Owens-Illinois, Inc.,
513 F2d 286 (5th Cir, 1975) 10

Martin v. Malcolm Pirnie, Inc.,
949 F2d 611 (2d Cir, 1991),
cert. denied, 506 US 905 (1992) 11

Skidmore v. Swift & Co., 323 US 134 (1944) 3

Yourman v. Dinkins, 826 F Supp 736
(SDNY, 1993), aff'd, 84 F3d 655 (2d Cir),
petition for cert. filed sub nom.
Giuliani v. Dinkins, No. 96-152 . . . . . 1 12

Statutes

5 USC section 2105(a) & (d) 12

5 USC section 6323(a)(1) & (b) 12

10 USC section 270 12

29 USC section 213(a)(1) 1 3 6

29 USC section 216(a) 10

32 USC section 502 12

NY Military Law section 242[5] 12

Regulations

29 CFR Sections 500 through 899 3

29 CFR Part 541 3

29 CFR section 541.1 3

29 CFR section 541.2 3

29 CFR section 541.5d 3 5 6

29 CFR section 541.118(a) 4

29 CFR section 541.118(a)(4) 11

29 CFR section 541.118(a)(6) 4 8

Other

57 FR 37674 10

59 FR 57130 8

INTEREST OF AMICUS CURIAE

The City of New York and related entities ("City") have over 8,000 managerial employees, and thousands more supervisory employees, whom the City always has considered within the exemption for the Fair Labor Standards Act ("FLSA") for persons "employed in a bona fide executive, administrative or professional capacity." 29 USC section 213(a)(1). Over 5,000 of these employees have sued the City for back overtime and liquidated damages on the theory that under the salary basis test they actually are hourly employees. One of those cases went to a judgment that was adverse to the City on the principal legal issues and the Court of Appeals for the Second Circuit affirmed. Yourman v. Dinkins, 826 F Supp 736 (SDNY, 1993), aff'd, 84 F2d 655 (2d Cir, 1996). The City's petition for a writ of certiorari is pending. Giuliani v. Yourman, No. 96-152.

The judgment in Yourman, with interest and attorneys' fees, is now certainly over 14 million dollars for back overtime and liquidated damages and a very rough guess is that the City's exposure in the five other lawsuits may be as much as 20 to 25 million dollars.

The salary basis test, as applied in Yourman, leaves the City between the Scylla and Charbdis of making virtually all of its previously-exempt employees hourly employees and of revising its policies to mirror the salary basis test. Making all of its managers hourly employees would be costly; the City estimated, in the record in Yourman, that if it were to make all of its managers hourly employees and if each manager were to work two hours of overtime each week, the annual cost to the City would be 60 million dollars. This is a lot of money, even to the Nation's largest city, especially in these times of flat tax revenue and plummeting State and federal financial assistance, and especially when it would be paid for work already performed

and work performed by employees who always understood that they were to work as many hours each week as necessary to discharge their responsibilities and whose salaries were set with the understanding that they would not be paid overtime.

The alternative of revising policies to satisfy the salary basis test is no better. The City revised its policies after the District Court ruled on liability in Yourman in 1993. The policies now provide that under no circumstances may a manager be docked salary because of a court appearance or temporary military leave, even if all relevant leave balances have been exhausted. This obviously creates the potential for abuse by unscrupulous employees and at least arguably causes petitioners to violate the public accountability principle (see Petition for a Writ of Certiorari in Giuliani v. Yourman, No. 96-152 ["Yourman Pet."], at 10).

The revised policies also provide that disciplinary sanctions that would involve a loss of salary, such as a fine or suspension, may not be imposed. Termination and demotion, the only remaining meaningful penalties, are very serious penalties and the City is loath to impose them unless it believes that the infraction is equally serious and the Courts will not overturn them under the progressive discipline principle (see Yourman Pet. at 14). Because this leaves the City with no potential monetary penalties for less than very serious infractions, the City's ability to deter less than very serious infractions is greatly hampered.

In Yourman the City argues that the salary basis test, when applied to the public sector, is irrational and contrary to the intent of Congress and therefore should be struck down in its entirety as arbitrary and capricious under the Administrative Procedure Act. It is unclear to us at this time whether this argument will be made in the present case. If

it is, we respectfully refer the Court to the Yourman Petition (at 19-26) and Reply Brief in Support of Petition ("Yourman Pet. Reply") (at 1-4). If it is not, we respectfully submit that that would be a reason why the petition in Yourman should be granted.

THE SALARY BASIS TEST SHOULD RECEIVE ON JUDICIAL REVIEW ONLY SUCH DEFERENCE AS ITS PERSUASIVENESS PERMITS.

As a general rule, federal regulations are overturned by the Courts only if they are arbitrary and capricious. Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843-44 (1984). However, agency "interpretations," as opposed to true "regulations," are entitled to deference only to the extent that they are persuasive. Skidmore v. Swift & Co., 323 US 134, 139-40 (1944) Here, the salary basis test of 29 CFR section 541.118(a) is found within Subpart B of 29 CFR Part 541, which is entitled "Interpretations." (Sections 541.1, 541.2 and 541.5d of 29 CFR are found in Subpart A of 29 CFR Part 541, which is entitled "General Regulations.") See 29 CFR Sections 500 through 899, revised as of July 1, 1996, at section 541.1. Congress did not instruct the Department of Labor ("DOL") to set the minimum wage, determine how many hours could be worked per week before overtime pay would be required, set the rate of overtime, or determine who would be exempt from the FLSA, but merely to "define[] and delimit[]" the managerial exemption. 29 USC section 213(a)(1).

Thus, the salary basis test is an "interpretation," not a "regulation" entitled to Chevron deference, and in reviewing it this Court should defer to the agency's expertise and interpretation of the managerial exemption only to the extent that the salary basis test is persuasive.

NEITHER PETITIONERS NOR EVEN THE DEPARTMENT OF LABOR ARGUES FOR A STRICT READING OF THE SALARY BASIS TEST.

The salary basis test provides that an employee is not within the managerial exemption if his or her salary is "subject to" reduction for any of several specified reasons. 29 CFR section 541.118(a). Strictly read, this provision means that the salary basis test is not met, and the employee is not within the managerial exemption, if there is any policy of the employer covering the employee under which a reduction in salary theoretically could occur for any one of the reasons set forth in the salary basis test.

Forgive us if we are stating the obvious, but neither petitioners nor even DOL argues that the salary basis test should be applied as it is written. Nor could they credibly do so.

First of all, the salary basis test undermines a strict reading of itself in two ways. It provides that employees need not be paid anything in workweeks in which they perform no work and it contains the "window of correction." 29 CFR section 541.118(a) & (a)(6). Both of these provisions undermine the notion that "[e]ither pay is fixed and immutable, ... or it is contingent," Abshire v. County of Kern, 908 F2d 483, 487 (9th Cir, 1990), cert. denied, 498 US 1068 (1991), upon which the salary basis test is based.

In addition, in response to this Court's invitation while the petition for a writ of certiorari was pending herein, the Solicitor General submitted a brief on behalf of DOL in which he stated that DOL's new view is that the salary basis test is not met only if the employee in question is subject to impermissible deductions as a practical matter. However, this was only the most recent and most hasty of the many

retreats DOL has made from the plain language of the salary basis test when applied to the public sector. Before the adoption of 29 CFR section 541.5d, DOL first ruled that where a partial-day deduction is made because of illness, the exemption would be lost only for that employee and only for the workweek in which the deduction was made (Yourman Pet. at 11). Then DOL announced a non-enforcement rule with respect to partial-day docking (id.). DOL finally effectively repealed the prohibition on partial-day docking (id. at 11-13).

In a December 1993 letter ruling, DOL stated, inter alia, that disciplinary suspensions of a workweek for reasons not constituting infractions of safety rules of major significance would be permissible and that absences from work for court appearances where the employee is under no legal compulsion to be present in court are absences for personal reasons and thus deductions may be made for such absences (Yourman Pet. at A 50-53). Finally, beginning in November of 1994 DOL began a semi-annual ritual of publishing, in its regulatory agenda in the Federal Register, both an acknowledgement that the salary basis test needs comprehensive revision and an adjournment of that comprehensive revision (Yourman Pet. at 30-32). Despite stating in November 1994 that the regulations are "sorely out-of-date," in May 1996 DOL gave the date of "01/00/97" for the date on which it would issue a notice of proposed rulemaking (Yourman Pet. at 32).

It is thus plain that for years not even DOL has believed in the salary basis test as written.

THIS COURT SHOULD HOLD THAT WHERE A DEDUCTION NOT PERMITTED BY THE SALARY BASIS TEST OCCURS, THE EXEMPTION IS LOST ONLY FOR THAT EMPLOYEE AND ONLY FOR THE WORKWEEK IN WHICH THE DEDUCTION IS MADE.

(1)

On January 15, 1986, DOL issued a letter ruling stating that where an occasional impermissible deduction occurs for a partial-day absence, the managerial exemption would be lost for that employee but only for the workweek in which the deduction took place (Yourman Pet. at A 40). DOL cautioned, however, that if such deductions were to become "regular and recurring," DOL "would question" whether the employee is in fact paid "on a salary basis" (id.).

We believe that if this Court does not invalidate the salary basis test as a whole, the foregoing formulation of how that test should be applied is the formulation that should be adopted by this Court. Although it originally was set forth only on the partial-day docking issue, which issue later was fully resolved by the promulgation of 29 CFR section 541.5d, that formulation works equally well (or equally unsatisfactorily) for the other types of deductions prohibited by the salary basis test.

There are, to be sure, shortcomings with this formulation. It focuses on the employee rather than the "capacity" in which the employee serves, which is the focus of the exemption in the statute. 29 USC section 213(a)(1) ("bona fide executive, administrative or professional capacity"). In close cases this formulation will beg the

question of whether the deductions are "regular and recurring."

Petitioners might argue that this formulation makes no sense in the disciplinary context because it rewards the miscreant, i.e., the person found guilty of disciplinary charges, in that only the miscreant who received an impermissible deduction is "rewarded" by being paid overtime. The answer, however, is that the salary basis test, and particularly the disciplinary component, make no sense in the public sector and thus if you start with it, wherever you come out is less than entirely satisfactory. (It is for this reason that we argue in Yourman that the entire salary basis test should be thrown out.) This argument would be made on behalf of people found guilty of disciplinary charges who would be seeking a windfall as the result of the fact that they committed infractions and their employers imposed a penalty other than termination or a suspension of some whole number of workweeks. How this is related to the goals of the FLSA is impossible to fathom (see Yourman Pet. Reply at 9-10).

Furthermore, if the alternative is that when an "impermissible" disciplinary sanction is imposed, the entire class of which the miscreant is a member is then considered hourly, the ridiculous result is that the entire class is rewarded with back overtime because of a single act of misfeasance (coupled with the impermissible penalty) (see Yourman Pet. at 35-36).

Petitioners and the Solicitor General, speaking on behalf of DOL, argue that this Court should pull out of the air the words "as a practical matter" and insert them after the words "subject to reduction." Courts do not do this; it is for agencies to write regulations.

Moreover, this standard is meaningless. It does not instruct a Court what to look at or what conclusion to reach.

The standard suggested above, that the Court look at whether the employee in question has been subjected to "regular and recurring" deductions, is far more instructive. The "as a practical matter" formulation adds next to nothing to the attempt to make sense of the phrase "subject to" in the salary basis test and its adoption by this Court would leave the lower Courts with little more guidance than they now have from DOL, which is to say, none (see Yourman Pet. at 31) (quoting 59 FR at 57130) (DOL complaining that judicial decisions "are creating law without considering a comprehensive analytical approach to current compensation concepts and workplace practices" [which is what we thought DOL is supposed to be doing]).

(2)

This Court also could take a broad interpretation of the word "inadvertent" in the "window of correction" provision of the salary basis test, which reads as follows, 29 CFR section 541.118(a)(6):

> The effect of making a deduction which is not permitted under these interpretations will depend upon the facts in the particular case. Where deductions are generally made when there is no work available, it indicates that there was no intention to pay the employee on a salary basis. In such a case the exemption would not be applicable to him during the entire period when such deductions were being made. On the other hand, where a deduction not permitted by these interpretations is inadvertent, or is made for reasons other than lack of work, the exemption will not be considered to have been lost if the employer reimburses the employee for such deductions and promises to comply in the future.

No deduction ever could be truly "inadvertent," as every deduction requires the intentional act of writing a paycheck for an amount different from the amount the employee usually receives. Thus, when DOL drafted the window of correction, it could not have intended a strict interpretation of the word "inadvertent."

Instead, giving meaning to the word "inadvertent" should focus on the employer's policy and whether the person who actually ordered the deduction was, and knew that he or she was, acting pursuant to and in compliance with the employer's policy toward those employees the employer considers exempt.

Such an interpretation of the word "inadvertent" would perhaps be the best result because it would protect both small and large State and local governments from simple errors that, in the view of the plaintiffs in these cases, allegedly should result in large payments of back overtime. Small governments may well have managers who do not know the salary basis test and who do not have access to lawyers who do. Large governments, such as the City with well over 8,000 exempt employees, face the possibility of erroneous deductions simply because of the large number of individuals who are involved in the process of implementing policies, issuing paychecks and imposing disciplinary sanctions.

(3)

Whatever result this Court reaches, the reasoning should encompass the "impermissible" deductions in the Yourman case so that those deductions do not render the plaintiffs in Yourman non-exempt. We say this in part because of course we want to win that case but also because it would be bad policy, and certainly could not have been the intent of Congress in enacting the FLSA, for all 8,000 City

managers to become non-exempt because discovery in Yourman revealed only the following arguably "impermissible deductions" in a span of over four years:

1. Plaintiff Harold Yourman was docked $6.25 for overstaying his lunch hour but the $6.25 was reimbursed in his next paycheck.

2. Plaintiff Vito LaBella was demoted for two weeks, which caused him to lose $258 in salary, for putting an obscene message, apparently about a female co-worker, on the Emergency Medical Services computer system. We note that DOL has said in the Federal Register that demotions are permissible penalties. 57 FR 37674.

3. Plaintiff Theodore DiGilio was suspended for nine days but then, pursuant to a settlement, was reimbursed for the nine days that he did not work and agreed to forfeit four vacation days.

4. Disciplinary sanctions imposed on managers who are not parties to the lawsuit are irrelevant because a Rule 23 class action is not available under the FLSA; employees must "opt in" or they will not benefit from the judgment. 29 USC section 216(a); LaChappelle v. Owens-Illinois, Inc., 513 F2d 286, 288 (5th Cir, 1975). In any event, even considering managers who were not parties to Yourman, cryptic documents in the record, about which there was no testimony, seem to indicate that three managers at the Fire Department, who are not plaintiffs in Yourman, each were fined five or ten days' pay on one occasion.

5. In addition, one employee of the Department of Housing Preservation and Development, Marvin Wilkinson, who also is not a plaintiff in Yourman, was fined twice for failing to file a financial disclosure form.

In short, all of the above arguably "impermissible deductions" should fall within the window of correction. Although only Mr. Yourman has been reimbursed to date, the window of correction was very narrowly interpreted by the Second Circuit Court of Appeals in Martin v. Malcolm Pirnie, Inc., 949 F2d 611 (2d Cir, 1991), cert. denied, 506 US 905 (1992), and under that ruling reimbursement by the City would not be sufficient to restore an employee to exempt status. We also must note that none of the other individuals have asked to be reimbursed; the plaintiffs in Yourman would prefer to leverage these "impermissible deductions" into windfall payments of back overtime rather than see these individuals reimbursed.

THIS COURT MUST BE AWARE THAT ITS HOLDING ON THE MEANING OF THE PHRASE "SUBJECT TO" MAY WELL BE APPLIED BY THE LOWER COURTS TO DEDUCTIONS FOR COURT APPEARANCES AND TEMPORARY MILITARY LEAVE AS WELL AS DEDUCTIONS AS DISCIPLINARY SANCTIONS.

Although the present case, to our knowledge, involves only deductions as disciplinary sanctions, the phrase "subject to" in the salary basis test applies to, and the "actual deduction/theoretical possibility" question arises as to, the other types of deductions rendered "impermissible" by that test as well (see Yourman Pet. at 16, 34-35; Yourman Pet. Reply at 2-3). Those are deductions for time missed for jury duty, appearance as a witness, and temporary military leave. 29 CFR section 541.118(a)(4). Thus, the lower courts probably will believe that whatever this Court says in this case about the phrase "subject to" and the "actual deduction/theoretical possibility" issue must be applied to issues concerning deductions for these other purposes.

We call this to the Court's attention, naturally enough, because issues concerning deductions for these other purposes arise in Yourman. The City's policy concerning court appearances was that paid leave would be granted only where the employee was under subpoena or court order and neither the employee nor a relative had a personal interest in the case, which is inconsistent with the salary basis test's requirement that employees be granted paid leave for "appearance as a witness" (although DOL held, in a letter ruling issued after the liability ruling by the District Court in Yourman, that an appearance as a witness where the employee is not under legal compulsion to be present could be considered a personal absence and thus paid leave would not be required [Yourman Pet. at A 52]). The City's policy concerning temporary military leave was that employees could receive up to 30 calendar or 22 working days of paid military leave each year, figures taken from federal and state statutes that should be sufficient to cover the absences usually incurred by members of the Reserves and National Guard. 5 USC sections 2105(a) & (d) and 6323(a)(1) & (b); 10 USC section 270; 32 USC section 502; NY Military Law section 242[5].

There was no proof in Yourman that any manager ever had one penny deducted from salary as a result of an appearance as a witness or "temporary military leave." Nevertheless, the District Court ruled that because the City's policy on appearances as a witness differed from the salary basis test, and because the "limitation on paid military leave presents the potential for employees on temporary military leave to take leave without pay," every plaintiff in Yourman was non-exempt. 826 F Supp at 742 (Yourman Pet. at A 18-19). The Court of Appeals affirmed on the opinion of the District Court. 84 F2d at 656 (Yourman Pet. at A 7).

Again, we respectfully submit that this is a ridiculous result, especially when the record contains no proof of a

deduction for a court appearance or "temporary" military leave, when the vast majority of the plaintiffs will never testify as a witness, and the vast majority of the plaintiffs are not even members of the Reserves or National Guard. Again, then, whatever this Court writes in the present case, the opinion should make clear that in the circumstances in Yourman the City's policies concerning appearances as a witness and "temporary" military leave do not render every plaintiff in Yourman non-exempt.

Respectfully submitted,

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October 11, 1996

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In The

Supreme Court of the United States

October Term, 1996

FRANCIS BERNARD AUER, *et al.*,

Petitioners,

v.

DAVID A. ROBBINS, *et al.*,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE LEAGUE OF CALIFORNIA CITIES, THE FLORIDA LEAGUE OF CITIES, THE IOWA LEAGUE OF CITIES, THE INSTITUTE FOR LOCAL GOVERNMENT LAW; THE GEORGIA MUNICIPAL ASSOCIATION; THE CITY AND COUNTY OF SAN FRANCISCO; CALIFORNIA CITIES OF LOS ANGELES; SAN JOSE; AND SAN BUENAVENTURA; CALIFORNIA COUNTIES OF BUTTE AND SANTA CLARA; CITY OF PORTLAND, OREGON; GEORGIA CITIES OF GRIFFIN; SAVANNAH; AND WARNER ROBBINS; AND CITY OF CHICAGO, ILLINOIS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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MOTION FOR LEAVE TO FILE AN AMICUS BRIEF

Amici curiae move for leave to file the attached amicus curiae brief. Sup. Ct. R. 37.3. Respondents have consented to the filing of this brief. However, petitioners have granted only limited consent – expressly refusing to consent to amici raising the issue of whether the 10th amendment precludes application of the salary basis test to public employers. *See* Appendix C, Ltr. from Michael Leibig, October 9, 1996. Amici assert the existing salary basis test cannot validly be applied to public employers consistent with the Administrative Procedure Act (APA) and Tenth Amendment.

The issues raised in the attached brief are within the ambit of the questions posed to this Court: whether the salary basis test applies to public employees. Moreover, if the issues raised by amici are not addressed, amici believe that the flood of litigation triggered by the Department of Labor's failure to adjust the salary basis test to the fundamentals of public employment will continue unabated.

Amici curiae participating in this brief are the League of California Cities; the Florida League of Cities; the Iowa League of Cities; the Institute for Local Government Law; the Georgia Municipal Association; the City and County of San Francisco; California Cities of Los Angeles; San Jose; and San Buenaventura; California Counties of Butte and Santa Clara; City of Portland, Oregon; Georgia Cities of Griffin; Savannah; and Warner Robbins; and City of Chicago, Illinois.

The state leagues participating in this brief represent hundreds of municipalities, many of which face significant unfunded backpay liabilities as a result of the Department of Labor's salary basis test.

Two amici curiae, the cities of Los Angeles, California, and Portland, Oregon, are involved in Fair Labor Standards Act (FLSA) litigation pending in the United States Court of Appeals for the Ninth Circuit. In both cases, the Ninth Circuit has deferred final resolution of whether the salary basis test validly applies in the public sector pending the Court's resolution of this case. In *McGuire v. City of Portland*, 91 F.3d 1293 (9th Cir. 1996), the Ninth Circuit recently issued an Order regarding the City's petition for rehearing. The Order states: "Consideration of the petition for rehearing and suggestion for rehearing *en banc* is deferred pending the Supreme Court's decision in *Auer v. Robbins*." The Ninth Circuit issued a similar order in *Block v. City of Los Angeles*, et al., U.S. Court of Appeals for the Ninth Circuit, Nos. 94-56135, 94-56421, 94-55345. These orders are reproduced at Appendix A.

Resolution of whether the salary basis test validly may be applied to public employers is essential to amici and virtually all other local and state public employers. The Court should not issue an opinion determining the meaning and effect of the salary basis test without first reaching the critical issue whether the test is validly applied to the public sector. Amici believe this brief will assist the Court in ruling on the present case and resolving fully a longstanding issue which has divided the federal courts.

Counsel for amici have participated in salary basis test litigation in three federal circuits, including: *Stewart v. City and County of San Francisco*, 834 F.Supp. 1233 (N.D. Cal. 1993), *aff'd*, 69 F.3d 545 (9th Cir. 1995); *Service Employees Int'l Union Local 102 v. County of San Diego*; 60 F.3d 1346 (9th Cir. 1994), *cert. denied*, 116 S.Ct. 774 (1996); *Yourman v. Dinkins*, 84 F.3d 655 (2nd Cir. 1996), *petition for cert. filed*, 65 U.S.L.W. 3110 (Jul. 29, 1996) (No. 96-152); *McGuire v. City of Portland*, 91 F.3d 1293 (9th Cir. 1996); and *Jackson v. Commonwealth of Ky;* 892 F.Supp. 923 (E.D. Ky. 1995), *appeal pending*, Nos. 95-6283, 95-6284 (6th Cir. 1996).

Amici respectfully request this Court to grant leave to file the attached Amici Curiae Brief in support of respondents.

DATED: October 11, 1996 Respectfully submitted,

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TABLE OF CONTENTS

	Page
Table of Authorities	iv
I. INTRODUCTION	1
II. SUMMARY OF ARGUMENT	1
III. INTERESTS OF AMICI CURIAE	5
IV. THE HISTORY OF THE SALARY BASIS TEST'S APPLICATION TO STATE AND LOCAL GOVERNMENT	5
1. The Fair Labor Standards Act and Its Overtime Exemption for White Collar Employees	5
2. Department of Labor Regulations	6
a. Origin of the Salary Basis Test	6
b. DOL's Response to the Supreme Court's Decision in *Garcia v. San Antonio Metropolitan Transit Authority*	7
c. DOL's 1991-1992 Rulemaking	9
d. DOL's Continuing Failure to Act On Its 1985 Advance Notice of Proposed Rulemaking	10
V. ARGUMENT	12
A. AS APPLIED TO STATE AND LOCAL GOVERNMENT, THE SALARY BASIS TEST VIOLATES THE ADMINISTRATIVE PROCEDURE ACT	12
1. The Court Should Confirm That The Salary Basis Test Was Invalid In Its Entirety Prior To September 1991	14

TABLE OF CONTENTS – Continued

Page

2. DOL's Limited Rulemaking in 1991-1992 Failed to Satisfy The Agency's Rulemaking Responsibilities 17

a. The Salary Basis Test Is Invalid Because DOL Continues To Refuse To Articulate Any Rationale For Applying The Test In The Public Sector 17

b. The Salary Basis Test Is Invalid As Applied In The Public Sector Because DOL Refused To Consider Important Aspects Regarding Application Of The Test To State And Local Government 20

c. The Salary Basis Test Is Invalid Because It Is Irrational As Applied In The Public Sector 21

d. DOL's Delay In Conforming Its Regulations To Public Sector Employment In Itself Violates The APA 23

e. The Salary Basis Test Does Not Survive The Heightened Judicial Scrutiny Invoked When Federal Regulations Impinge Upon Local Sovereign Interests 24

B. APPLICATION OF THE SALARY BASIS TEST TO LOCAL AND STATE GOVERNMENTS ALSO VIOLATES THE TENTH AMENDMENT 26

TABLE OF CONTENTS – Continued

Page

1. *Garcia* and *Gregory* Bar Application Of The Salary Basis Test Absent A Plain Statement by Congress 26

2. DOL Has Failed To Meet The Minimum Procedural Requisites of *Garcia* 28

VI. CONCLUSION 30

TABLE OF AUTHORITIES

Page

CASES

Abshire v. County of Kern, 908 F.2d 483 (9th Cir. 1990), *cert. denied*, 498 U.S. 1068 (1991).....9, 10

Addison v. Holly Hill Fruit Products, 322 U.S. 607 (1944).....14

American Textile Mfrs., Inc. v. Donovan, 452 U.S. 490 (1981).....18

Atlanta Professional Firefighters Union v. City of Atlanta, 920 F.2d 800 (11th Cir. 1991).....9

Balgowan v. State of N.J., Dept. of Transp., 84 F.3d 656 (3rd Cir. 1996), *reh'g granted, Op. and J. vacated* (1996).....16

Block v. City of Los Angeles, et al. U.S. Court of Appeals, Ninth Circuit, Nos. 94-56135, 94-56421, 94-55345.....1

Bowen v. American Hosp. Ass'n, 476 U.S. 610 (1986).....4, 24, 25

California State Board of Optometry v. Federal Trade Comm'n, 910 F.2d 976 (D.C. Cir. 1990).....25, 28

Camp v. Pitts, 411 U.S. 138 (1973).....18

Campesinos Unidos v. United States Dept. of Labor, 803 F.2d 1063 (9th Cir. 1986).....23

Carpenter v. City and County of Denver, 82 F.3d 353 (10th Cir. 1996).....9

Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837 (1984).....13, 14, 17, 19

Cincinnati Bell Telephone Co. v. F.C.C., 69 F.3d 752 (6th Cir. 1995).....18

TABLE OF AUTHORITIES – Continued

Page

Connick v. Myers, 461 U.S. 138 (1983).....22

Dixon v. United States, 381 U.S. 68 (1965).....14

Florida v. United States, 282 U.S. 194 (1931).....24

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Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).....*passim*

Girouard v. United States, 328 U.S. 61 (1946).....16

Gregory v. Ashcroft, 501 U.S. 452 (1991).....4, 26, 27, 29

Jackson v. Com. of Ky., 892 F.Supp. 923 (E.D.Ky. 1995).....16

Kinney v. District of Columbia, 994 F.2d 6 (D.C. Cir. 1993).....3

Maryland v. Wirtz, 392 U.S. 183 (1968).....5

McDonnell v. City of Omaha, 999 F.2d 293 (8th Cir. 1993).....9

McGuire v. City of Portland, 91 F.3d 1293 (9th Cir. 1996).....1, 3

MCI Telecommunications Corp. v. FCC, 627 F.2d 322 (D.C. Cir. 1980).....23

Michigan Association of Governmental Employees v. Michigan Dep't of Corrections, 992 F.2d 82 (6th Cir. 1993).....9

Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983).....4, 17, 18, 20

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TABLE OF AUTHORITIES – Continued

Page

National Muffler Dealers Assn. v. United States, 440 U.S. 472 (1979) 16

Oil, Chemical and Atomic Workers Intern. v. Zegeer, 768 F.2d 1480 (D.C. Cir. 1985) 24

Securities Exchange Comm'n v. Sloan, 436 U.S. 103 (1978) 14

SEIU, Local 102 v. County of San Diego, 60 F.3d 1346 (9th Cir. 1995), *cert. denied*, 64 U.S.L.W. 3349 (Jan. 16, 1996) 8, 16

Skidmore v. Swift & Co., 323 U.S. 134 (1944) 13

Telecommunications Research & Action Center v. FCC, 750 F.2d 70 (D.C. Cir. 1984) 23

United States v. Camp, 723 F.2d 741 (9th Cir. 1984) 11

United States v. Darby, 312 U.S. 100 (1941)..... 5

Will v. Michigan Dept. of State Police, 491 U.S. 58 (1989) 27

STATUTES

5 U.S.C. § 555(b) 23

5 U.S.C. § 701, et seq..... 12

5 U.S.C. § 706 .....13, 23

29 U.S.C. § 202..... 5

29 U.S.C. § 206..... 6

29 U.S.C. § 207 .....5, 6

29 U.S.C. § 213 .....5, 6, 14

Fed. R. Evid. 201(f)..... 11

TABLE OF AUTHORITIES – Continued

Page

CODE OF FEDERAL REGULATIONS

29 C.F.R. § 541.1.....6, 8

29 C.F.R. § 541.2.....6, 19

29 C.F.R. § 541.3.....6, 7

29 C.F.R. § 541.5d 10, 21

29 C.F.R. § 541.118 .....2, 6, 7, 19, 21

5 C.F.R. §§ 551.101-551..... 3

FEDERAL REGISTER

50 Fed. Reg. 47696 (Nov. 19, 1985)..... 8

56 Fed. Reg. 54824 (Sep. 6, 1991) 9

57 Fed. Reg. 37666 (Aug. 19, 1992)..... *passim*

58 Fed. Reg. 24569 (Apr. 26, 1993) 11

59 Fed. Reg. 57127 (Nov. 14, 1994)..... 11

60 Fed. Reg. 23543 (May 8, 1995) 11

60 Fed. Reg. 59608 (Nov. 28, 1995)..... 11

61 Fed. Reg. 23238 (May 13, 1996) 12

OTHER REFERENCES

Fair Labor Standards Amendments of 1985 Pub. Law No. 99-150, § 6..... 6, 7, 8

Fisher, *Federalism Contra Federal Reservism: Bank Holding Companies and State Bank Powers*, 33 U.S.F.L. Rev. 317 (1989)..... 27

TABLE OF AUTHORITIES – Continued

Page

Floor Debate on S.1725, Congressional Record (May 7, 1973) 15

H.R. Rept. No. 93-313, 93rd Cong. 2d Sess. p. 27 (1974) (emphasis added) 15

Odom, *The Tenth Amendment After Garcia: Process-Based Procedural Protections*, 135 U.Pa.L.Rev. at 1675-76 27

S. Rept. No. 93-300, 93rd Cong., 1st Sess., pp. 15, 25 (1973) 15

S. Rept. No. 93-690, 93rd Cong., 2d Sess. p. 13 (Feb. 22, 1974) (emphasis added) 15

I. INTRODUCTION

This is a case of a federal agency's regulatory authority run amuck. By deliberate indifference, the United States Department of Labor ("DOL") has allowed its salary basis test to generate hundreds of lawsuits, and potentially, billions of dollars in liability to state and local taxpayers. Yet applying the salary basis test to state and local governments contradicts Congressional intent, violates the most minimal requirements of federal rulemaking, and denies local governments the basic process mandated by the Court in *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985). This Court should say so.

The need for such a statement is clear. While many lower courts now agree that the salary basis test was invalid as applied to public employers before its modification in 1992, the issue of the test's validity after 1992 remains a source of disagreement among federal courts. In particular, the Ninth Circuit has deferred resolution of the validity of the test after 1992 pending a ruling in this case.[1] The Court should end the controversy by holding that in light of the DOL's incomprehensible lack of action, application of the test to state and local governments violates the Administrative Procedure Act and the Tenth Amendment of the United States Constitution.

II. SUMMARY OF ARGUMENT

Since its enactment in 1938, Congress has exempted executive, professional and administrative ("white collar") employees from the Fair Labor Standards Act's

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[1] *McGuire v. City of Portland*, 91 F.3d 1293 (9th Cir. 1996); petition for rehearing. *Block v. City of Los Angeles*, et al., U.S. Court of Appeals, Ninth Circuit, Nos. 94-56135, 94-56421, 94-55345. See Appendix A.

(FLSA's) overtime provisions. In 1954, based on evidentiary hearings involving only private sector employers, DOL issued the salary basis regulation, 29 C.F.R. section 541.118. The regulations were based upon evidence that "salaried" status was a nearly universal indicator of white collar employment in the private sector.

When Congress amended the FLSA in 1974 to apply to public employees, Congress intended that the white collar exemptions apply in the public sector.

In 1985, the Court ruled in *Garcia*, 469 U.S. 528, that the FLSA validly applied to state and local public employers. DOL soon recognized that the salary basis test, created to exempt white collar employees in the private sector from the FLSA, did not exempt these same employees in the public sector.[2]

It was not until 1991 and 1992, however, that DOL finally acted on this knowledge. Faced with conflicting court rulings and huge taxpayer liabilities, DOL eliminated a central feature of the salary basis test: the "partial day docking" provision. In doing so, DOL admitted: "The regulations were . . . out of harmony with the intent of the [FLSA] because State and local governments could not practically avail themselves of the exemptions intended by Congress, and thus were *inappropriate* as applied to the public sector." 57 Fed. Reg. 37666, 37672 (Aug. 19, 1992) (emphasis added).

Inexplicably, however, in 1991 and 1992 DOL refused to consider (1) whether the salary basis test as a whole is a

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[2] Unlike their private sector counterparts, public employers were subject to rules of public accountability, as well as to civil service rules and due process constraints unique to public employment. As a result, public sector employers routinely required employees *at all levels* to account for their time, and deducted from all employees' pay for time not worked.

valid indicator of white collar status in the public sector; and (2) whether any of the remaining, ancillary aspects of the test were valid indicia of white collar status in the public sector. DOL concluded only that these aspects of the salary basis test were not "open for comment" and would be considered at a later date. DOL also refused – as it has to this day – to consider whether the salary basis test appropriately applies to the public sector *at all*.

Since 1992, DOL has recognized continuing problems with the operation of the salary basis test generally, and its disciplinary restriction in particular. In more than half a dozen published regulatory agenda, DOL has lamented its "progressive loss of control" over interpretation of the salary basis test and promised action.

Despite its promises of change, for more than a decade DOL has left in place a salary basis test that bears little if any relation to the manner in which public employers distinguish between white collar and other employees. Significantly, for this reason, *the federal government has chosen not to apply the salary basis test to its own operations.*[3]

Administrative agencies have a duty to address and refine their regulations on an ongoing basis. The extension of the FLSA to millions of public employees was plainly an event of sufficient magnitude to trigger DOL's duty to examine whether the salary basis test appropriately distinguished white collar employees in the public sector. DOL had even greater reason to act because the agency admits

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[3] *See* 5 C.F.R. §§ 551.101-551; *McGuire v. City of Portland*, 91 F.3d 1293, 1296 (9th Cir. 1996) (Skopil, J., concurring) ("[T]he federal government, notwithstanding the FLSA, has elected not to apply the salary standards, including the disciplinary provisions, to federal employees."); *Kinney v. District of Columbia*, 994 F.2d 6, 12 (D.C. Cir. 1993) (regulations applying FLSA to federal government "contain no salary basis test."); 57 Fed. Reg. at 37667.

it was aware that the salary basis test did not function properly in the public sector and contradicted Congressional intent.

In short, application of the salary basis test to public employers violates the APA because: (1) the test contravenes Congressional intent; (2) DOL has never articulated a rationale for applying the salary basis test to the public sector; (3) DOL failed in 1992 to address important aspects of the problem with the salary basis test; (4) the salary basis test operates irrationally as applied to public employers; and (5) DOL has unreasonably failed to address the salary test's recognized infirmities in a timely manner.

DOL's duty to state a rationale for the salary basis test is heightened by the Court's Tenth Amendment precedents. At a minimum, federalist principles require DOL to articulate a solid reason, founded on clear Congressional intent, for requiring local and state governments to conform to federal regulation of matters traditionally within local government's control.[4] Control of employment practices in local government is indisputably such a matter.

Further, under *Garcia* and *Gregory v. Ashcroft*, 501 U.S. 452 (1991), the salary basis test, an administrative action which significantly intrudes on local governance, cannot validly be applied to state and local governments absent Congressional ratification. And even if the Court were to

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[4] The issue is not whether local and state public employers *can* alter their disciplinary systems to eliminate suspensions of one to five days for FLSA exempt employees. Rather, the issue is whether DOL has articulated a rationale solidly founded on the goals of the FLSA for requiring public employers to do so. *See Bowen v. American Hosp. Ass'n*, 476 U.S. 610, 643 (1986) (citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983) ("an agency's action must be upheld, if at all, on the basis articulated by the agency itself.")).

accord DOL's actions the same deference it has accorded Congressional actions under *Garcia*, DOL manifestly has failed to provide an adequate forum for local and state government to challenge the application of the salary basis test.

III. INTERESTS OF AMICI CURIAE

The interests of Amici are stated in the Motion for Leave to File this Amicus Curiae brief.

IV. THE HISTORY OF THE SALARY BASIS TEST'S APPLICATION TO STATE AND LOCAL GOVERNMENT

1. The Fair Labor Standards Act And Its Overtime Exemption For White Collar Employees

The FLSA was adopted in 1938. One of the Act's core provisions is a requirement that employers pay overtime compensation to employees working over a specified number of hours (usually 40) per workweek, unless the employees are exempt. 29 U.S.C. §§ 207 and 213.

When first enacted by Congress, the FLSA covered only private employers. *See* 29 U.S.C. § 202; *United States v. Darby*, 312 U.S. 100 (1941). In 1966, Congress extended the Act's coverage to certain government employees, particularly hospital workers and employees in some local transit operations. *See Maryland v. Wirtz*, 392 U.S. 183 (1968).

In the Fair Labor Standards Amendments of 1974, Congress attempted to extend coverage to all public employers. *See* 57 Fed. Reg. 37666, 37667 (Aug. 19, 1992). However, in *National League of Cities v. Usery*, 426 U.S. 833 (1976), the Court ruled that extending the FLSA to state

and local government violated the Tenth Amendment. The Supreme Court reversed *National League of Cities* in *Garcia*, 469 U.S. 528 (1985). The Fair Labor Standards Amendments of 1985 made the Act applicable to state and local public entities on April 15, 1986. *See* Fair Labor Standards Amendments of 1985, Pub. Law No. 99-150, § 6.

Since its original enactment in 1938, Congress has exempted certain "white collar" employees from the FLSA's overtime requirements:

> The provisions of §§ 206 [wages] and 207 [hours] of this title *shall not apply* with respect to . . . any employee employed in a bona fide *executive, administrative, or professional* capacity . . . (*as such terms are defined and delimited from time to time by regulations of the Secretary*. . . .)

29 U.S.C. § 213(a)(1) (emphasis added).

Thus, while Congress mandated that white collar employees be exempt from overtime, Congress delegated to DOL the responsibility for defining and delimiting the exemptions. The FLSA itself makes no mention of a "salary basis test."

2. Department Of Labor Regulations

a. Origin Of The Salary Basis Test

In 1940, when the FLSA applied only to private employers, DOL established two categories of tests to determine whether employees qualify for the white collar exemption – the "duties" test, 29 C.F.R. §§ 541.1, 541.2 ("administrative" exemption); 541.3 ("professional" exemption), and the "salary basis test." *See* 29 C.F.R. § 541.1(f); 541.2(e)(1); 541.3(e); 541.118.

The current salary basis test – which has not changed significantly since 1954 – was developed after 22 days of hearings and evidence *gathered from private employers*. 57

Fed. Reg. at 37666. With certain exceptions, the test requires exempt employees to be paid a fixed amount for an entire workweek, "without regard to the number of days or hours worked."[5]

The principal rationale for the salary basis test was that exempt employees in the private sector were nearly universally paid on a salary basis. 57 Fed. Reg. at 37666. No public sector employers participated in the hearings which led to the development of the salary basis test because the FLSA did not apply to public employment at that time.

b. DOL's Response To The Supreme Court's Decision in *Garcia v. San Antonio Metropolitan Transit Authority*

After the Court's decision in *Garcia*, the FLSA was extended to state and local government. In the Fair Labor Standards Amendments of 1985, Congress attempted to address certain concerns unique to state and local employers, and postponed the effective date of the FLSA

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[5] The test provides:

> An employee will be considered to be paid "on a salary basis" within the meaning of the regulations if under his employment agreement he regularly receives each pay period on a weekly or less frequent basis, a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the quality or quantity of work performed. Subject to [certain] exceptions . . . , the employee must receive his full salary for any week in which he performs any work without regard to the number of days or hours worked. This policy is also subject to the general rule that an employee need not be paid for any workweek in which he performs no work.

29 C.F.R. § 541.118(a).

to the public sector to April 15, 1986. Congress did *not* address the white collar exemptions or DOL's related (Part 541) regulations. *See* Fair Labor Standards Amendments of 1985.

Shortly after *Garcia*, DOL issued its 1985 Advanced Notice of Proposed Rulemaking (ANPR) regarding the 29 C.F.R. Part 541 ("white collar") regulations. DOL asked specifically: "Should the salary tests be eliminated?" 50 Fed. Reg. 47696 (Nov. 19, 1985) This ANPR represented the first opportunity for state and local government to comment on the white collar regulations.

After receiving public comments, DOL soon learned that because of public pay practices, the salary basis test effectively eliminated the white collar exemptions in the public sector. 57 Fed. Reg. at 37666, 37667. Yet DOL conducted no rulemaking. In fact, DOL has never conducted rulemaking pursuant to its 1985 ANPR.

In January 1987, DOL *promised* rulemaking, and in the meantime adopted "a non-enforcement policy . . . with regard to the salary basis of payment for otherwise exempt public employees." 57 Fed. Reg. at 37668. As one court concluded last year: "This nonenforcement policy is tantamount to an admission by DOL that the regulation in place, i.e., the salary basis test, was unsuitable as applied to public employees." *SEIU, Local 102 v. County of San Diego*, 60 F.3d 1346, 1357 (9th Cir. 1995), *cert. denied*, 64 U.S.L.W. 3349 (Jan. 16, 1996).

Despite admitting that the salary basis test was unsuitable as applied to public employees, DOL authorized private litigation. "In effect, the DOL abdicated its central role in this evolving process and punted, sending the salary basis test and the overtime compensation issue to the courts." *Id.*

> Worse yet, the promised rulemaking did not immediately materialize. *Four years* passed with the nonenforcement policy in place and no definitive activity by the DOL to address this pressing problem. In the meanwhile, public employers and public employees found themselves in complex litigation trying to grapple with these pressing issues on which the DOL should have provided guidance, but did not.

Id. at 1357-58.

In the absence of rulemaking or definitive guidance from DOL, conflicting rulings regarding application of the salary basis test were issued in virtually every circuit in the United States. Judge Reinhardt of the Ninth Circuit Court of Appeals issued the seminal decision in *Abshire v. County of Kern*, 908 F.2d 483 (9th Cir. 1990), *cert. denied*, 498 U.S. 1068 (1991), holding the county liable for its public accountability policy of authorizing pay only for time actually worked. Various courts adopted *Abshire's* holding, *see, e.g., Carpenter v. City and County of Denver*, 82 F.3d 353, 357 (10th Cir. 1996); *Michigan Association of Governmental Employees v. Michigan Dep't of Corrections*, 992 F.2d 82 (6th Cir. 1993), others limited the holding to instances where there had been actual, as opposed to merely theoretical, deductions in pay. *See, e.g., McDonnell v. City of Omaha*, 999 F.2d 293, 297 (8th Cir. 1993); *Atlanta Professional Firefighters Union v. City of Atlanta*, 920 F.2d 800, 805 (11th Cir. 1991).

c. DOL's 1991-1992 Rulemaking

More than five years after the FLSA was extended to state and local government, DOL finally addressed the salary basis test through rulemaking. In September 1991, DOL issued an Interim Final Rule (IFR), in recognition that the salary basis test "could well result in enormous, unforeseen liability of [state and local] governments and may threaten their fiscal integrity." 56 Fed. Reg. 45824, 45825 (Sep. 6, 1991). The IFR authorized deductions from

salary and leave balances, thereby eliminating the effect of *Abshire*. In August 1992, DOL published its Final Rule, which is nearly identical to the IFR. *Compare* 29 C.F.R. § 541.5d, 57 Fed. Reg. at 37677 *with* the IFR, 56 Fed. Reg. at 45826.

In the Final Rule, DOL admitted: (1) the salary basis test was never intended to apply to public employers; (2) applying the salary basis test to public employers would "inappropriately deprive" public employers of the white collar exemptions; and (3) the salary basis regulations were "out of harmony with the intent of the [FLSA]." *Id.* at 37672.

Despite these admissions, DOL corrected only the aspect of the salary basis test identified by *Abshire*. DOL refused on procedural grounds to reconsider the key aspect of the salary basis test at issue in this litigation – its restriction on disciplinary suspensions. *See* 57 Fed. Reg. at 37674 (the issue "was not open for comment.") DOL also decided that sufficient justification had not been shown to eliminate the salary basis test. As a result, DOL created a self-contradictory rule: exempt employees must be paid "on a salary basis," but deductions for absences are permitted. *See* 29 C.F.R. § 541.5d. Significantly, nowhere in the 1992 regulation or commentary did DOL articulate any rationale for applying the salary basis test in the public sector.

d. DOL's Continuing Failure To Act On Its 1985 Advance Notice of Proposed Rulemaking

Since its 1992 rulemaking, DOL has continued to promise rulemaking pursuant to its 1985 ANPR. Despite repeated promises, and a request by the Office of the President, DOL has never considered whether the salary

basis test appropriately applies to the public sector; articulated any rationale for application of the test to the public sector; or carried out its rulemaking first proposed over ten years ago.

In April 1993, DOL published a notice stating its intention to carry out rulemaking by September 1993 concerning the white collar exemptions. 58 Fed. Reg. 24569 (Apr. 1993). The year passed without action by DOL.

In April 1994, on behalf of the President of the United States, Leon Panetta asked the Secretary of Labor to "undertake a comprehensive review and revision of the FLSA overtime regulations, as they apply to the public sector, to make them workable in today's economy." (Appendix B, Ltr. from Panetta to Reich, dated April 14, 1994.)[6] DOL, however, never responded.

In November 1994, DOL issued a regulatory agenda blaming "recent court rulings" for the confusion regarding its salary basis and other "white collar" regulations, and admitting that a "comprehensive review of [the white collar] regulations is both necessary and appropriate." DOL again promised rulemaking. 59 Fed. Reg. 57127, 57129 (Nov. 14, 1994).

In May and November 1995, DOL issued almost identical agenda. 60 Fed. Reg. 23543, 23544 (May 8, 1995); 60 Fed. Reg. 59608 (Nov. 28, 1995). Despite recognizing

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[6] Amici respectfully request the Court to take judicial notice of this letter. *See* Fed. Rules Ev., Rule 201(f); *United States v. Camp*, 723 F.2d 741 (9th Cir. 1984.) The letter from Mr. Panetta also states: "[D]ue to the outdated nature of the section 541 regulations, some highly compensated public sector employees with responsibilities that would normally exempt them from coverage may be eligible for overtime, a situation that could cost State and local governments hundreds of millions of dollars." (*Id.*)

that its regulations were out of date, DOL again blamed the courts for inconsistent rulings. "[R]ecent court rulings have caused confusion as to what constitutes compliance with the regulations 'salary basis' criteria in both the public and private sectors." DOL added:

> Legal developments in court cases are causing *progressive loss of control* of the guiding interpretations under this exemption and are creating law without considering a comprehensive analytical approach to current compensation concepts and workplace practices. These court rulings are creating apprehension in both the private and public sectors. Clear, comprehensive, and up-to-date regulations would provide for central, uniform control over the application of these regulations and ameliorate this apprehension. 60 Fed. Reg. at 59613-14.

Most recently, on May 13, 1996, DOL yet again noted that its 1992 rulemaking was "limited," its regulations were therefore "still in need of updating and clarification," and that the agency continued to experience a "progressive loss of control over the regulations." 61 Fed. Reg. 23238 (May 13, 1996).

V. ARGUMENT

A. AS APPLIED TO STATE AND LOCAL GOVERNMENT, THE SALARY BASIS TEST VIOLATES THE ADMINISTRATIVE PROCEDURE ACT

The Administrative Procedure Act (APA), 5 U.S.C. § 701, *et seq.*, imposes substantive and procedural limitations on rulemaking carried out by administrative agencies such as DOL. Under the APA, courts must set aside agency rules that (1) conflict with or frustrate Congressional intent; (2) are arbitrary, capricious, an abuse or discretion, or otherwise not in accordance with law; or

(3) are unconstitutional. *See* 5 U.S.C. § 706; *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 842 (1984).[7]

This case raises fundamental questions about DOL's rulemaking responsibilities under the FLSA. There are two time periods which frame the APA analysis. The first period is from April 15, 1986 (the date the FLSA was first extended to the state and local government), until September 6, 1991 (the date DOL finally conducted limited rulemaking on one aspect of the salary basis test). The second period is from September 6, 1991 through the present.

DOL has failed to meet its minimum responsibilities under the APA during both of these periods. Remarkably, to this date, DOL continues to abdicate its duty to address how or even whether the salary basis test should apply in the public sector. In addition, the agency *expressly refuses* to articulate any rationale for forcing public entities to alter their personnel and disciplinary systems in order to meet the terms of the regulations. Amici believe that DOL has acted in direct contravention of its responsibilities as outlined by the Court in its previous APA decisions.

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[7] Amici agree with the Wisconsin Attorney General that the salary basis test is an interpretive, rather than a substantive, regulation. Thus, under *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), whether courts defer to DOL's salary basis interpretations depends upon their internal consistency, logic and persuasive power. Here, amici apply the Court's *Chevron* APA standards, and demonstrate that the salary basis test cannot pass muster even under this more deferential standard.

1. The Court Should Confirm That The Salary Basis Test Was Invalid In Its Entirety Prior to September 1991

The most elemental principle of administrative rulemaking is that an agency cannot promulgate regulations implementing a statute it administers which eviscerate the statute. Any rule or regulation that cannot be harmonized with its authorizing Congressional act is a nullity. *Dixon v. United States*, 381 U.S. 68, 74 (1965).

> [T]he courts are the final authorities on issues of statutory construction and are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute.

Securities Exchange Comm'n v. Sloan, 436 U.S. 103, 118 (1978) (citations omitted).

When reviewing an agency's construction of a statute, courts must first ascertain whether Congress expressed its intent on the issue. *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 842 (1984). A court must give effect to the unambiguously expressed intent of Congress. *Fort Stewart Schools v. Federal Labor Relations Auth.*, 495 U.S. 641, 645 (1990).

Here, Congress has stated plainly that the FLSA's overtime provisions "shall not apply" to executive, administrative and professional employees. 29 U.S.C. § 213(a). Congress has directed DOL to "define and delimit" the white collar exemptions on an ongoing basis. *Id.; see also Addison v. Holly Hill Fruit Products*, 322 U.S. 607, 617 (1944) (the exemptions are "part of a legislative code subject to continuous revision with the changing course of events.") Most importantly, Congress clearly

has indicated its intention that the white collar exemptions apply to state and local government.[8]

Despite these Congressional mandates, DOL failed to redefine the salary basis test after the FLSA was extended to state and local government. Significantly, *DOL itself admits that the salary basis test was contrary to Congressional intent*, at least until its 1991 rulemaking. *See* 57 Fed. Reg. at 37672.

Given this critical admission, many courts have concluded without difficulty that until September 1991 the salary basis test was invalid as applied in the public

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[8] The House Committee report accompanying the bill that became the 1974 FLSA amendments stated:

> Section 6 of the bill extends minimum wage and overtime coverage to about 5 million *non-supervisory* employees in the public sector not . . . covered by the Act. . . . The bill will provide that virtually all *non-supervisory* government employees will be covered. . . . By the same token, the committee intends to cover all employees (*except professional, executive, and administrative personnel who are exempted under section 13 of the law*) in all civilian branches of the Federal Government.

H.R. Rept. No. 93-313, 93rd Cong., 2nd Sess. p. 27 (1974) (emphasis added). *See also* S. Rept. No. 93-690, 93rd Cong., 2d Sess., p. 13 (Feb. 22, 1974) (emphasis added); S. Rept. No. 93-300, 93rd Cong., 1st Sess., pp. 15, 25 (1973).

Senate testimony reiterated this intent. Senator Dominick, who introduced an early version of the Senate bill, stated in testimony:

> [T]his bill would extend minimum wage coverage to some 4.7 million Federal, State, and local government employees not now covered by the Fair Labor Standards Act. *Coverage would not be extended to . . . professional, executive, and administrative personnel. . . .*

Floor Debate on S.1725, Congressional Record (May 7, 1973).

sector. *See, e.g., SEIU*, 60 F.3d 1346; *Balgowan v. State of N.J., Dept. of Transp.*, 84 F.3d 656 (3rd Cir. 1996), *reh'g granted*, Op. and J. *vacated* (1996); *Jackson v. Com. of Ky.*, 892 F.Supp. 923, 929 (E.D.Ky. 1995), *appeal pending*, Nos. 95-6283, 95-6284 (6th Cir. 1996).

Here, the Court should address this issue because the plaintiffs seek to apply the test before it was amended by DOL. The Court should conclude that the test violates the APA because, by DOL's admission, the test conflicted with Congressional intent.

Petitioners assert that Congress has impliedly ratified the salary basis test by passing legislation that mentions the test, and by failing to pass legislation aimed at eliminating the test. (Pet. Br., 26-28.) Whether courts find an "implied ratification" depends "on the degree of scrutiny Congress has devoted to the regulation during subsequent re-enactments of the statute." *National Muffler Dealers Assn. v. United States*, 440 U.S. 472, 477 (1979). There is no ratification absent clear evidence that Congress had actual knowledge of the challenged regulation at the time of reenactment. *Girouard v. United States*, 328 U.S. 61, 69 (1946).

The petitioners cannot meet this standard because at the time of the 1974 and 1985 Amendments, the issues regarding the salary basis test were not "generally recognized." *See* 57 Fed. Reg. at 37672, 37666. Further, the legislative subsections in which Congress has since mentioned the salary basis test are all aimed at *eliminating the effect of the test* in each legislative act at issue. (*See* Pet. Br., at 26.) Congress' effort to avoid any impact from the salary basis test in its recent legislation is certainly not evidence that Congress has ratified the test.

2. DOL's Limited Rulemaking In 1991-1992 Failed To Satisfy The Agency's Rulemaking Responsibilities

DOL's 1991-1992 rulemaking is insufficient to meet minimal standards under the APA. The Court should conclude that the salary basis test is invalid even after DOL issued a narrow amendment in September 1991.

a. The Salary Basis Test is Invalid Because DOL Continues to Refuse to Articulate Any Rationale for Applying the Test in the Public Sector

Amici recognize that administrative agencies such as DOL are generally entitled to deference in their rulemaking and administrative interpretations. *Chevron*, 467 U.S. at 844. However, the doctrine of judicial deference presupposes that the agency has observed its essential rulemaking duties. One essential duty is manifest: the agency must articulate some basis for its decision or action.

As explained by the Court: "[T]he agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis." *Id.* at 863-64. The agency must explain its interpretations so the courts can determine whether they are entitled to deference as "a reasonable accommodation of manifestly competing interests." *Id.* at 865; *see also Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 44 ("[T]he agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.' "). Thus, it

is DOL, not those affected by DOL's action, that must justify its regulations.[9]

In the absence of any explanation, courts may not attempt to supply their own "reasoned basis for the agency's action. . . . " *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43.[10] Rather, the validity of an agency's action must be determined on the administrative record made. *Camp v. Pitts*, 411 U.S. 138, 143 (1973).[11]

The record here shows that prior to its 1991 and 1992 salary test amendments, DOL failed to articulate any rationale for applying the salary basis test in the public sector. In 1992, DOL explained why it was eliminating the partial day docking provision of the salary basis test, but *expressly* declined to articulate any rationale for leaving the remaining portions of the test in place. When asked to consider the remaining elements of the salary basis test, DOL avoided, delayed, and equivocated. ("Only partial-day deductions from pay when leave was not used or exhausted and furlough-required deductions were addressed by the interim final rule. All other aspects of

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[9] *See also Cincinnati Bell Telephone Co. v. F.C.C.*, 69 F.3d 752, 758 (6th Cir. 1995).

[10] *See also, American Textile Mfrs., Inc. v. Donovan*, 452 U.S. 490, 539 n.73 (1981). ("[T]he courts will not be expected to scrutinize the record to uncover and formulate a rationale explaining an action, when the agency in the first instance has failed to articulate such rationale.").

[11] DOL's failure to explain how or why the salary basis test furthers some purpose of the FLSA when applied to public sector employment has caused many to posit their own explanations. The petitioners here believe the salary basis test is an "objective barometer of exempt status." (Pet. Br., at 32.) Petitioners' assertions miss the central point: it is the *agency's* obligation to articulate the rationale for its rules, and courts may not fill the gap. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. at 43.

the salary test were left unchanged for the public sector. . . . " 57 Fed. Reg. at 37671; "Section 541.118(a)(5) [governing unpaid disciplinary suspensions] was not open for comment during the present rulemaking" 57 Fed. Reg. at 37674; "The Department expects to address [the issue of compensatory time off] as appropriate in proposed revisions of Part 541 at a later date" 57 Fed. Reg. at 37673; "[C]omments [arguing differences between public and private employment] do not address the 'salary basis' subject matter of the current rulemaking and will have to be dealt with at a later date when revisions to Part 541.2 are considered and proposed for public comment" 57 Fed. Reg. at 37673.)

Finally, DOL abdicated its responsibility by seeking to reverse its regulatory burden, arguing that *state and local governments had not proven the remainder of the test should be eliminated*. DOL's faulty understanding of its regulatory burdens is apparent from its commentary. "Sufficient justification has not been shown in the comments to warrant eliminating altogether the 'salary basis' requirements or making it inapplicable to public sector employees. . . . " 57 Fed. Reg. at 37673.

If the Court's jurisprudence in this area stands for anything, it is that administrative regulations do not attain validity solely by virtue of their existence. Agencies have a duty to supply a rationale for their rules. *Chevron*, 467 U.S. at 865. In this case, DOL has failed that duty. Under the Court's established APA authority, the lack of any stated rationale for DOL's course of conduct constitutes a per se violation of the APA.

b. The Salary Basis Test Is Invalid As Applied In The Public Sector Because DOL Refused To Consider Important Aspects Regarding Application Of The Test To State And Local Government

In addition to violating its duty to explain why the salary basis test is appropriately applied in the public sector, DOL violated a second responsibility: to evaluate all important aspects of the salary basis test when applied to state and local government. As the Court has explained, agencies violate the APA when they fail to consider an important aspect of the problem. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut.*, 463 U.S. at 44.

Here, as the foregoing section illustrates, the best that can be said of DOL's performance is that it finally addressed the salary basis test's prohibition on partial day docking. In its 1992 rulemaking, DOL declined to address any of the remaining salary basis test requirements. DOL refused to clarify the application of those subsections of the test that remained after its 1992 rulemaking. The agency declined to address the effect of compensatory time off practices that are prevalent in the public sector. DOL refused to consider whether the differences in public and private sector employment required additional changes to the salary basis test. And, the agency did not consider its prohibition on disciplinary suspensions, pronouncing that the issue "was not open for comment." 57 Fed. Reg. at 37674.

Nearly every circuit court of appeals has grappled with application of the salary basis test in the public sector, and with DOL's prohibition on disciplinary suspensions in particular. Clearly, important questions regarding the salary basis test remain unanswered after DOL's 1992 rulemaking, including whether the salary basis test should apply in the public sector *at all*. DOL's

failure, indeed refusal, to consider these problems constitutes a second, independent basis to conclude that the salary basis test as applied to state and local government violates the APA.

c. The Salary Basis Test Is Invalid Because It Is Irrational As Applied In The Public Sector

The salary basis test not only lacks a stated rationale, but is facially and operationally irrational when applied to public sector employment.

After its 1992 rulemaking, DOL continues to require that exempt employees be paid "on a salary basis" – *i.e.*, a predetermined amount of weekly pay regardless of their daily attendance. Yet, in section 541.5d, DOL expressly allows the possibility of hourly deductions in pay for partial day absences. It is illogical to require payment of a predetermined "salary," yet allow hourly deductions. In effect, the "salary" required by DOL in the public sector is the functional equivalent of hourly pay.

In addition to this facial inconsistency, application of the salary basis test operates irrationally. One of the most troubling aspects of the test is the subsection upon which the petitioners premise liability in this case – DOL's prohibition on disciplinary suspensions. *See* 29 C.F.R. § 541.118(a)(5). Under the test, the white collar exemption is not lost if an employee who commits a major safety violation is suspended for less than a week. Smoking in an explosives plant or coal mine is an example of a major violation. *Id.* For misconduct other than major safety violations, an unpaid disciplinary suspension of less than a workweek eliminates a white collar employee's exempt status.

This dichotomy is nonsensical. It means that to maintain the exemption, an employer may impose a short-term suspension for a major infraction, but must impose a longer term suspension for a minor infraction.

DOL's restriction on disciplinary suspensions is particularly senseless when applied in the public sector. When DOL eliminated its prohibition on partial day docking, the agency based its decision on principles of public accountability – that most government agencies appropriately require all employees to account for their time, regardless of rank or status. *Yet, the same accountability principles underlie public sector disciplinary systems with even greater force*. It simply makes no sense to suggest that local governments' interest in accurate timekeeping exceeds its interest in disciplining improper conduct.[12] As this Court has recognized, employee discipline is *fundamental* to the integrity of government. *See Connick v. Myers*, 461 U.S. 138, 150-51 (1983) (affirming government's legitimate purpose in "maintain[ing] proper discipline in the public service").

Moreover, the restriction on disciplinary suspensions creates irrational results when applied in the context of public sector discipline. Most public employees, even white collar employees, are subject to civil service rules and union contracts providing that dismissals may occur only for just cause. This contrasts sharply with private sector employees, who generally serve at the will of their employer. Where a just cause requirement exists, courts and arbitrators invariably require "progressive discipline" to ensure that employees have the opportunity to

---

[12] In concrete terms, the present rule allows a public employer to deduct from pay if an employee goes to the dentist, but not if the employer is punishing the employee because the dentist appointment turned out to be a trip to the racetrack.

correct problems. Suspensions of less than a workweek are generally part of this progressive discipline process.

It is true, of course, that an employer has the option of giving a white collar employee suspensions in increments of full workweeks. However, where punishments are greater than those given to other employees represented by the same unions, the disparity forms a basis for challenging the discipline as unfair. Often, union agreements or local rules even specify the discipline for particular offenses. Conversely, if white collar employees are merely given a written reprimand, lower level employees assert they have been treated unfairly.

In short, the regulation mandates a senseless divergence in progressive disciplinary systems based solely on FLSA status. Nothing in the FLSA, its history, or in DOL's pronouncements since 1985 supports interfering with disciplinary systems in the public sector.

d. DOL's Delay in Conforming Its Regulations To Public Sector Employment In Itself Violates The APA

Unreasonable delay by an administrative agency in satisfying the mandates of its authorizing statute violates the APA. *See* 5 U.S.C. § 555(b) (agencies must conclude matters before them within a reasonable time); 5 U.S.C. § 706(1) (reviewing court may compel an agency action unlawfully withheld or unreasonably delayed). While this Court has not addressed these timeliness requirements, other courts have. *See Campesinos Unidos v. United States Dept. of Labor*, 803 F.2d 1063, 1068 n.2 (9th Cir. 1986). A delay of four or five years is unreasonable. *See MCI Telecommunications Corp. v. FCC*, 627 F.2d 322, 340-41 (D.C. Cir. 1980) (four-year delay of rulemaking unreasonable); *Telecommunications Research & Action Center v. FCC*, 750 F.2d 70, 77 (D.C. Cir. 1984) (five-year delay warranted

continuing jurisdiction over the agency's rulemaking timetable); *Oil, Chemical and Atomic Workers Intern. v. Zegeer*, 768 F.2d 1480 (D.C. Cir. 1985) (same).

The record here establishes that *since 1985*, DOL has avoided action in the face of mounting evidence that the salary test does not work in the public sector. DOL's *decade-long* delay in responding to its mandate to define and delimit the white collar exemption for public employees is indefensible.

e. The Salary Basis Test Does Not Survive The Heightened Judicial Scrutiny Invoked When Federal Regulations Impinge Upon Local Sovereign Interests

DOL has demonstrated a fundamental misunderstanding of its minimal burden to articulate *a rationale based on evidence* when applying regulations to state and local government. This Court has confirmed that the need for a proper evidentiary basis is especially acute where a federal agency intrudes upon an area traditionally entrusted to state governance, particularly where Congress has not indicated that it envisions such interference. *See Bowen v. American Hospital Ass'n*, 476 U.S. at 643.

> [T]he propriety of the exertion of [an agency's] authority must be tested by its relation to the purpose of the [statutory] grant and with suitable regard to the principle that whenever the federal power is exerted within what would otherwise be the domain of state power, the justification of the exercise of the federal power must clearly appear.

Id. at 645; *see also Florida v. United States*, 282 U.S. 194, 211-12 (1931).

Applying the salary basis test to state and local employment is an exertion of federal power "within what would otherwise be the domain of state power." *Bowen*, at

645. The salary basis test interferes with precisely the kinds of structural decisions appropriately left to local government: whether government workers can be suspended for improper behavior, and how a government calculates salaries and ensures the integrity of their payroll and personnel systems. The decisions regarding these procedures are meant to insure that public employees, no matter how high ranking, are compensated only for time worked and fairly disciplined. The people's faith in their government depends on these principles.

Under *Bowen*, the federal bureaucracy *cannot* impinge upon matters of fundamental local concern, such as the accountability of government workers to the public, without articulating a solid reason founded in statutory authority and the administrative record before the agency. Here, there is neither an evidentiary record, nor even a stated rationale, for applying the salary basis test to the public sector.

In the present case, the principles of *Bowen* are compelling. Public agencies throughout the country have been subjected to massive unfunded liabilities because of DOL's inaction. That liability, and the cost of defending lawsuits such as this one, are not borne by stockholders – they are borne by taxpayers. Just as critically, the costs are suffered by those who rely on the essential services provided by states, cities and counties – services such as police and fire protection, hospitals, parks, housing, education and street repair. If a federal agency establishes rules imposing liabilities that take away from these critical services, it is not too much to ask that it have and articulate a solid reason founded either in the clear language of a statute, or, at very least, the clear intent of Congress. *See California State Board of Optometry v. Federal Trade Comm'n*, 910 F.2d 976 (D.C. Cir. 1990).

B. APPLICATION OF THE SALARY BASIS TEST TO LOCAL AND STATE GOVERNMENTS ALSO VIOLATES THE TENTH AMENDMENT

Applying the salary basis test to local and state public employers under the circumstances discussed above also directly runs afoul of the Tenth Amendment.

1. *Garcia* And *Gregory* Bar Application Of The Salary Basis Test Absent A Plain Statement by Congress

In *National League of Cities v. Usery*, 426 U.S. 833 (1976), this Court invalidated the FLSA as applied to state and local government based on the Tenth Amendment. Nine years later, however, the Court overruled *National League of Cities* in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985). Even after *Garcia*, however, application of the salary basis test to local governments is contrary to the Tenth Amendment.

In *Garcia*, the Supreme Court made clear that the states' primary protection from Congressional action that burdens their integrity is the states' representation in Congress. 469 U.S. at 551. Thus, the Court considers first whether the "built-in restraints that our system provides through state participation in federal governmental action" has operated to protect the states' interests. *Id.* at 556. If there have been "possible failings in the national political process," the Court will decide whether Congress has exceeded the limits imposed by the Tenth Amendment. *Id.* at 554.

Significantly, this protection of political participation is unavailable when the challenged action is not a statute but an administrative regulation. As one commentator has explained:

> [*Garcia*'s] process-oriented doctrine of constitutional law has no applicability, however, to the dealings of state legislatures and state agencies with federal agencies, where there can be no question of protection through political representation, other than the usually fruitless tactic of appealing to one's senator or congressman to intercede.

Fisher, *Federalism Contra Federal Reservism: Bank Holding Companies and State Bank Powers*, 33 U.S.F.L. Rev. 317, 369 (1989); *see also* Odom, *The Tenth Amendment After Garcia: Process-Based Procedural Protections*, 135 U.Pa.L.Rev. at 1675-76 (discussing proposal that federal intrusion into area of state concern should only be accomplished by Congress since agencies are too far removed from political process to safeguard states' interests).

The focus of the Court's discussion of the Tenth Amendment, in cases where the federal government has intruded upon matters traditionally left to state and local government, is whether *Congress* intended the intrusion. For example, in *Gregory v. Ashcroft*, 501 U.S. 452 (1991), the Court reiterated the "plain statement" rule requiring that "if *Congress* intends to alter the usual balance between the States and the federal government *it* must make its intention to do so unmistakably clear in the language of the statute." *Id.* (quoting *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 65 (1989) (emphasis added)). As the Court further observed in *Gregory*:

> Application of the plain statement rule thus may avoid a potential constitutional problem. Indeed, inasmuch as this Court in *Garcia* has left primarily to the political process the protection of the States against intrusive exercises of Congress' Commerce Clause powers, we must be absolutely certain *Congress* intended such an exercise.

501 U.S. at 464; *see also California State Bd. of Optometry*, 910 F.2d at 981-82 (D.C. Cir. 1990).

It is clear, of course, that Congress intended the FLSA to apply to state and local public employers. However, there is no indication whatever in the legislative history that Congress was even aware of the arcane requirements of DOL's salary basis test, much less the very significant manner in which they would affect the management of local government. As DOL has noted, "Congress presumably was *unaware* that, because many public sector compensation systems preclude payment for hours not worked," these systems would fail the salary basis test. 57 Fed. Reg. at 37672 (emphasis added). Similarly, there is no indication Congress was even aware of the other effects the salary basis test has on local governments, such as the prohibition on progressive discipline of less than seven days.

For these reasons, the Court should hold the salary basis test cannot be applied to local and state public employers because Congress has not plainly stated its intention that the test apply.

2. DOL Has Failed To Meet The Minimum Procedural Requisites of *Garcia*

Even if this court were to apply the kind of deference suggested by *Garcia* to the administrative processes of federal agencies, in this case, the procedural safeguards required by *Garcia* plainly have failed. DOL provided local governments no opportunity to revise or eliminate the salary basis test when the FLSA was extended to them. No hearings were held and no views were solicited. Rather, through administrative inaction, a test that was premised upon the practices of *private employers* 40 years ago was simply extended to government employers, with

no consideration given to the unique structure and principles applicable in the public sector.

Equally important, when the salary basis test was modified in 1991, DOL expressly refused to consider (1) whether the salary basis test itself is a valid indicator of white collar status in the public sector; and (2) whether any of the remaining aspects of the test, including the disciplinary prohibition, are valid indicators of white collar status.

The extent to which the process failed state and local governments is illustrated by the federal government's treatment of *itself* on this issue. The United States office of Personnel Management has *made the salary test inapplicable to federal employees*. *See* supra, n.3. DOL has failed, however, to offer state and local government employers similar treatment.

Under these circumstances, it is clear that the process afforded state and local governments through DOL has not adequately protected "the internal order . . . of the State[s]." *Gregory* at 458, *quoting The Federalist No. 45*, pp. 292-293. As the Court recognized in *Gregory*, the "operation" of state government is a matter uniquely reserved to the states themselves. While *Garcia* and *Gregory* recognize that Congress may alter the operation of state government if Congress does so directly and intentionally, those cases equally recognize that the federal government must exercise great caution when exerting its power in this area.

Plainly, DOL's conduct with respect to the salary basis test manifests no recognition of this Court's admonition that "the States retain substantial sovereign powers under our constitutional scheme, powers which Congress does not readily interfere." If *Congress* may not readily interfere with the operation of state government, a federal administrative agency must exercise at least the same

degree of circumspection. And just as plainly, DOL has not done so here.

VI. CONCLUSION

The Court should hold that the salary basis test in its entirety cannot validly be applied to state and local governments.

Respectfully submitted,

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**Attorney of Record*

DATED: October 11, 1996

APPENDIX A

APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MICHAEL T. MCGUIRE, JAMES P. KLUM, GRANT M. COFFEY, PATRICK A. DOONEY, JERRY L. IVIE, et al.,	) No. 95-35391)) D.C. No.) CV-94-00360-REJ
Plaintiffs-Appellees,	) ORDER
v.	)
CITY OF PORTLAND, OREGON,	) (Filed Aug. 30, 1996)
Defendant-Appellant.	)

Before: GOODWIN, SKOPIL and SCHROEDER, Circuit Judges.

The motion by amici curiae International Personnel Management association, et al., for leave to file an amicus curiae brief in support of the petition for rehearing and suggestion for rehearing en banc is GRANTED.

Consideration of the petition for rehearing and suggestion for rehearing en banc is deferred pending the Supreme Court's decision in *Auer v. Robbins*, 65 F.3d 702 (8th Cir. 1995).

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WAYNE BLOCK; ANICK CHARRON; EUGENE GREENE, et al., Plaintiffs-Appellees, v. LOS ANGELES DEPARTMENT OF WATER AND POWER, Defendant-Appellant.	No. 94-56135 D.C. No. CV-91-05461-JGD
WAYNE BLOCK; ANICK CHARRON; EUGENE GREENE, ROBERT B. HYDE; DAVID G. LEATHERMAN; SHU TAN, Plaintiffs-Appellees, v. CITY OF LOS ANGELES, Defendant-Appellant.	No. 94-56421 D.C. No. CV-91-05461-JGD
WAYNE BLOCK; ANICK CHARRON; EUGENE GREENE, Plaintiffs-Appellees, v. LOS ANGELES DEPARTMENT OF WATER AND POWER; CITY OF LOS ANGELES, Defendants-appellants.	No. 94-55345 D.C. No. CV-91-05461-JGD ORDER (Filed Oct. 2, 1996)

Before: BROWNING, WALLACE and FARRIS, Circuit Judges

Submission is vacated pending the disposition of *Auer v. Robbins*, 65 F.3d 702 (8th Cir. 1995), currently before the Supreme Court.

APPENDIX B

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

[SEAL]

THE DIRECTOR

APR 14 1994

Honorable Robert Reich
Secretary of Labor
Washington, D.C. 20210

Dear Mr. Secretary:

It has recently come to my attention that the section 541 regulations of the Fair Labor Standards Act (FLSA), which govern the payment of overtime, are currently the subject of numerous court cases involving employers and employees in the public sector. There is some prospect that similar court cases will continue to arise until the present regulations are reworked to take into account today's highly-educated, service-oriented workforce. The court cases suggest that, due to the outdated nature of the section 541 regulations, some highly compensated public sector employees with responsibilities that would normally exempt them from coverage may be eligible for overtime, a situation that could cost State and local governments hundreds of millions of dollars. I understand that your staff is fully aware of this issue.

I would appreciate it if the Department of Labor would undertake a comprehensive review and revision of the FLSA overtime regulations, as they apply to the public sector, to make them workable in today's economy. I also would urge you to work with the Office of Personnel

Management (OPM) to ensure consistency, to the degree possible, between your Department's regulations and OPM's regulations as they apply to public sector employees.

My staff would be pleased to work with your staff in framing the scope of this review. I think such an undertaking would be an excellent good government exercise. It would dovetail with your effort to improve and streamline the Department's enforcement of Federal labor laws and the Department's quest to ready the American worker and workplace for the 21st Century.

Thank you.

Sincerely,

Original Signed By
Leon E. Panetta
Leon E. Panetta
Director

APPENDIX C

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October 9, 1996

Darren W. Lee, Esquire
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Fifth Floor
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Re: *Auer v. Robbins* Respondent Supporting Amici

Dear Mr. Lee:

This letter is in response to your request for consent of the Petitioners in the Supreme Court case *Auer v. Robbins* (No. 95-897) to file an *amicus curiae* brief.

Petitioners consent to your filing an *amicus* brief on behalf of the League of California Cities, et al. with the sole caveat that the brief address only the issues concerning which the Court has granted *certiorari*. Those issues are:

1. *DOL's Public Sector Salary Basis Rules.* Do the "salary basis rules" set out in 29 C.F.R. Section 541.5d incorporating 29 C.F.R. 541.118(a)(5) apply to public employees?

2. *The "Subject To" Rule.* Do those rules require the loss of exempt status when a clear, intentional, unreformed disciplinary code "subjects" employees to non-safety suspensions of less than a full work period or only in cases of actual suspensions?

3. *The "Window of Corrections."* Does the "window of correction" in 29 C.F.R. Section 541.118(a)(6) allow an employer to treat a group of employees as exempt simply by revoking a small portion of an offending disciplinary rule, which it had actually applied after the initiation of litigation, to a member of the employee group, without revoking the more general "subject to discipline" rule and without actually restoring the lost compensation to the employee involved?

Petitioners do not consent, nor would it be appropriate under the applicable rules, to your filing a brief which raises other FLSA or 10th or 11th Amendment federalism issues in which your clients may have an interest, but concerning which the Court has not expressly granted *certiorari* in this case.

With that sole caveat, you have Petitioners' consent to file an *amicus* brief.

Sincerely,

/s/ Michael T. Leibig /G
Michael T. Leibig
Petitioners' Counsel
Auer v. Robbins

MTL/blf

Supreme Court, U.S.
FILED
AUG 29 1996
CLERK

No. 95-897

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

FRANCIS BERNARD AUER, *et al.*,
Petitioners,
v.
DAVID A. ROBBINS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF THE AMICUS CURIAE	1
SUMMARY OF THE ARGUMENT	2
ARGUMENT	3
I. THE SALARY BASIS TEST REGULATES THE SCOPE OF THE NATIONAL HOURS STANDARD, THE MAINTENANCE OF WHICH IS A CENTRAL AND INDEPENDENT OBJECTIVE OF THE FLSA	4
II. THE SALARY BASIS TEST IS A REASONABLE TEST FOR EXCLUSION FROM THE PROTECTION OF THE FLSA'S MAXIMUM HOUR STANDARD	8
III. THE EMPLOYER DID NOT CARRY ITS BURDEN OF PROVING PLAINTIFFS WERE PAID ON A SALARY BASIS	17
A. The Employer's Express Policy Rendered Plaintiffs "Subject to" Disciplinary Suspension	18
B. The Plaintiffs Were "Subject to" Disciplinary Suspension "as a Practical Matter"	22
IV. THE EMPLOYER CANNOT GO THROUGH THE WINDOW OF CORRECTION	25
CONCLUSION	27

TABLE OF AUTHORITIES

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Atlanta Professional Firefighters Union v. Atlanta, 920 F.2d 800 (11th Cir. 1991) 21
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NLRB v. Aerospace Co., Div. of Textron, 416 U.S. 267 (1974) 16
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Page

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29 U.S.C. § 207 16
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29 U.S.C. § 216 ..... 17, 26
Pub.L. 99-150, 99 Stat. 787 (Nov. 11, 1985) 16
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29 C.F.R. § 118 ..... 3, 25
29 C.F.R. § 541 ..... *passim*
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Page

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

No 95-897

FRANCIS BERNARD AUER, *et al.*,
Petitioners,

v.

DAVID A. ROBBINS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

INTEREST OF THE AMICUS CURIAE

The American Federation of Labor and Congress of Industrial Organization (hereinafter AFL-CIO), a federation composed of 75 national and international unions representing over 13 million workers, files this brief *amicus curiae* with the consent of the parties as provided for in this Court's rules.

The AFL-CIO has a vital interest in the construction of one of the fundamental labor laws of our country, the Fair Labor Standards Act (hereinafter the FLSA), 29 U.S.C. § 201 *et seq.* The decisions below substantially

expand the categories of workers who are excluded from the protections of the Act in both the public and private sectors. The decisions also substantially increase the difficulty of enforcing the Act. The decisions therefore threaten the viability of the national maximum hour standard Congress created in the FLSA. It is for these reasons that the AFL-CIO seeks to state its views on the question before the Court.

SUMMARY OF THE ARGUMENT

For over 50 years, the salary basis test has been integral to determining whether employees are employed in a "bona fide executive, administrative, or professional capacity" and are thus exempt from the protection of the FLSA. In practice, the salary basis test regulates the scope of the Act's hours standard. The salary basis test is a reasonable test for exclusion from the maximum hours provisions because being paid on a salary basis is a readily identifiable proxy for performing the duties of an exempt employee, because employees who are paid on a salary basis control their own time and are thus not subject to the harms Congress aimed to remedy by discouraging long hours, and because being paid on a salary basis constitutes an adequate trade-off for the absence of statutory protection.

The Court of Appeals erred when it held that the employer in this case carried its burden of proving that the plaintiff-employees were paid on a salary basis because the employer maintained a written policy that rendered the employees "subject to" disciplinary suspension without pay for less than one week for reasons other than violation of safety rules of major significance and because plaintiff employees were "subject to" such suspensions as a practical matter.

The Court of Appeals also erred when it held that the employer could pass through the "window of correction" and thus maintain the exemption for an employee who had

actually been suspended because the employer did not reimburse the employee, did not promise to comply in the future, did not take either of these actions prior to the initiation of litigation, and did not act inadvertently.

ARGUMENT

In this case, the courts below substantially—and, we submit, erroneously—broadened the scope of the principal limitation on the protective sweep of the FLSA. The FLSA does not protect "any employee employed in a bona fide executive, administrative, or professional capacity . . . (as such terms are defined and delimited from time to time by regulations of the Secretary)." 29 U.S.C. § 213(a)(1). Since 1940, two years after the FLSA became law, the Department of Labor (hereinafter "DOL") has "defined and delimited" these statutory terms through two tests: a "salary test" and a "duties test." *See* 5 Fed. Reg. 4077 (1940) (sections 541.1(e), .2(a), .3(b)); 29 C.F.R. § 541.1(f), .2(e)(1), .3(e).[1]

To be exempt under these tests, an employee must (1) be paid a minimum salary[2] and (2) perform the duties of a bona fide executive, administrative, or professional employee. In turn, the "salary test" itself has two elements. To be exempt, employees must (1) receive a minimum amount of compensation each week and (2) receive this compensation on a "salary basis" rather than an hourly basis. *See, e.g.*, 29 C.F.R. § 541.1(f). It is the salary

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[1] In 1949, the DOL amended the regulation to specify, in a manner similar to the present 29 C.F.R. § 541.118(a), precisely what it means to be paid on a "salary basis." *See* 14 Fed. Reg. 7730, 7735 (1949). Finally, in 1954, the DOL adopted the test in the form at issue here. *See* 19 Fed.Reg. 4405 (1954).

[2] The only exceptions to this requirement are employees who hold a license or certificate to practice law or medicine and who are actually engaged in the practice of those professions, medical interns and residents, and teachers who need not be paid a minimum salary in order to qualify as exempt professionals. *See* 29 C.F.R. § 541.3(e).

basis element of the salary test that is at issue in this case.[3]

I. THE SALARY BASIS TEST REGULATES THE SCOPE OF THE NATIONAL HOURS STANDARD, THE MAINTENANCE OF WHICH IS A CENTRAL AND INDEPENDENT OBJECTIVE OF THE FLSA.

We begin our analysis by outlining the role of the salary basis test in effectuating the FLSA's statutory scheme.

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[3] The relevant parts of the regulation at issue provide:

> An employee will be considered to be paid "on a salary basis" within the meaning of the regulations if under his employment agreement he regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed. Subject to the exceptions provided below, the employee must receive his full salary for any week in which he performs any work without regard to the number of days or hours worked. This policy is also subject to the general rule that an employee need not be paid for any workweek in which he performs no work.
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> (1) An employee will not be considered to be "on a salary basis" if deductions from his predetermined compensation are made for absences occasioned by the employer or by the operating requirements of the business. Accordingly, if the employee is ready, willing, and able to work, deductions may not be made for time when work is not available.
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> (2) Deductions may be made, however, when the employee absents himself from work for a day or more for personal reasons, other than sickness or accident. Thus, if an employee is absent for a day or longer to handle personal affairs, his salaried status will not be affected if deductions are made from his salary for such absences.
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> . . . .
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> (5) Penalties imposed in good faith for infractions of safety rules of major significance will not affect the employee's salaried status. Safety rules of major significance include only those relating to the prevention of serious danger to the plant, or other employees, such as rules prohibiting smoking in explosive plants, oil refineries, and coal mines.

29 C.F.R. §541.118(a).

First, the salary basis test is, in practice, not relevant to the Act's minimum wage provision, but only to the coverage of the Act's maximum hour provision. This is because to pass the salary test, an employer must pay the employee in question a minimum amount that is intended to be well in excess of the minimum wage and pay the amount on a salary basis. In adopting the salary test, the DOL explained the basis of the minimum pay requirement: "the terminology of § 13(a)(1) implies a status which cannot be attained by those whose pay is close to or below the universal minimum envisaged in the act." DOL, "Executive, Administrative, Professional . . . Outside Salesman" Redefined—Report and Recommendations of the Presiding Officer at Hearings Preliminary to Redefinition 5 (Oct. 24, 1940) (hereinafter the "Stein Report"), JA 26.[4] Because a minimum weekly payment is a prerequisite to exemption, the requirement that the minimum be paid on a salary basis is ordinarily relevant only in overtime cases.

Second, the FLSA's hours standard is not intended to increase workers' compensation, but rather to create a financial incentive for employers to spread available work and reduce the dangers of overwork. Thus the suggestion made by many employers that the salary basis test is defective because it operates to bring workers who earn well in excess of the minimum wage within the protection of the FLSA is misplaced. Payment in excess of the minimum wage by itself does not suggest that a

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[4] When the salary test was first articulated, the minimum salary was $30 per week. Stein Report at 6. At that time, the minimum wage was 40 cents per hour. Stein Report at 19. An employee earning less than the minimum wage would have had to have worked over 75 hours in a week to pass the minimum payment element of the salary test and thus reach the salary basis element. A lack of administrative action has recently caused the minimum salaries to fall in relation to the minimum wage. The DOL attempted to correct this by increasing the minimum salaries to amounts in excess of 40 times the minimum wage, but the proposed regulation was deferred by presidential action. *See* 46 Fed.Reg. 3,013 (1981); 46 Fed.Reg. 11,972 (1981).

worker should be exempt from the FLSA's maximum hours provision. Congress intended to protect a wide range of workers—not only low wage workers—from the harms accompanying long hours. As the DOL explained when it first adopted the salary test in 1940: " 'A ceilng for hours' is just as much an independent objective of the Act as a 'floor for wages,' and surely it is a serious misreading of the Act to assume that Congress meant to discourage long hours of work only where the wages paid were close to the statutory minimum. Living conditions can be improved and work spread even where wages are comparatively high." Stein Report at 8, JA at 32. This Court has thus recognized the dual and independent objectives of the FLSA: "the FLSA was designed . . . to ensure that *each* employee covered by the Act would receive " '[a] fair day's pay for a fair day's work' *and* would be protected from 'the evil of 'overwork' *as well as* 'underpay.' " *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 739 (1981) (emphasis added).

Finally, workers at all earning levels continue to need the protection of the national hours standard. In fact, American workers have experienced a dramatic increase in the number of hours they work since the 1960s. The country's leading scholar of work time, Juliet B. Schor of Harvard University, and her colleague Laura Leete report that between 1969 and 1989, average annual hours of paid work by the fully employed increased by 138. *See* Laura Leete & Juliet B. Schor, Assessing the Time-Squeeze Hypothesis: Hours Worked in the United States, 1969-1989, 33 *Indus.Rel.L.J.* 25, 31 (1994). According to Louis Harris and Associates, the average American worked just over 50 hours per week in 1995 compared to just over 40 in 1973. *See* Humphrey Taylor, The Harris Poll 1995 #68, Table 2 (Nov. 6, 1995). A Joint Economic Committee staff study found that 80% of two-parent families with children worked more hours in 1989 than in 1979. *See* Labor Letter, *The Wall Street Journal*, Jan. 21, 1992, at A1. In April of 1994, average

manufacturing overtime hours were 4.8 per week, higher than they have been at any time since the BLS began collecting the statistics. *See* Juliet B. Schor, Worktime in Contemporary Context: Amending the Fair Labor Standards Act, 70 *Chi.Kent.L.Rev.* 157, 159 (1994) (citing Bureau of Labor Statistics, U.S. Dept. of Labor 41 *Employment and Earnings* 67 (1994)). According to Schor, 45% of American workers now work more than 45 hours a week. Juliet Schor, Decline of Leisure Time in America, 55 Vital Speeches of the Day 748, 749 (1994). And, while there is debate on other points, there is the broadest agreement that the increased work week is a pervasive reality for the well-educated, white-collar workers employers are most likely to misclassify as exempt executive, professional or administrative employees. *See* Mary Coleman & John Pencavel, Changes in Work Hours of Male Employees, 1940-1988, 46 *Ind. & Lab.Rel.Rev.* 262, 262 (1993); Coleman & Pencavel, Trends in Market Work Behavior of Women Since 1940, 46 *Ind. & Lab. Rel.Rev.* 653, 657 (1993).

The effects of the increase in work hours is exacerbated by the fact that household work has not declined to compensate for the increase of paid labor. While the average number of hours of household work done by women did decrease between 1969 and 1987, the decrease was more than offset by an increase in women's paid labor and men's household and paid work. Leete & Schor, Time-Squeeze at 33. The result is that total hours worked per year rose by 161 for women and 139 for men between 1969 and 1987. *Id.*

The increase in work hours has led to precisely the types of harms Congress aimed to eradicate through the creation of a national hours standard. A 1991 Gallup poll found that nearly two-thirds of working parents felt they spent too little time with their children. Larry Hugick & Jennifer Leonard, Gallup Poll, Mirror of America—Role of Work; Job Dissatisfaction Grows;

'Moonlighting' on the Rise, 56 Gallup Poll News Service (Sept. 2, 1991). More than one-third reported "a great deal" or "quite a lot" of conflict between the demands of work and family or personal relationships. *Id.* at 6. When asked which realm "suffers more" from such conflict, 77% responded that family and relationships suffer more. *Id.*

Increased work hours has thus caused a decline in the "general well-being of workers," particularly those on the border of the statutory exemptions. 29 U.S.C. § 202(a). The exemptions to the FLSA, and particularly the salary basis test for exemption, should be "narrowly construed" in order to further the objective embodied in the national hours standard. *Michael v. Kentucky Finance Co.*, 359 U.S 290, 295 (1959).

II. THE SALARY BASIS TEST IS A REASONABLE TEST FOR EXCLUSION FROM THE PROTECTION OF THE FLSA'S MAXIMUM HOUR STANDARD.

During the past 50 years, the DOL has taken extensive testimony and reviewed voluminous comments concerning the salary test and on five occasions has expressly affirmed the test's utility as a means of distinguishing between exempt and nonexempt employees.

The DOL has held three sets of hearings, in 1940, 1949, and 1958, to consider the definitions of the exemptions, and has solicited comments on the definitions, in 1954. *See* Stein Report; DOL, Report and Recommendations on Proposed Revisions of Regulations, Part 541 Defining the Terms "Executive" "Administrative" "Professional" "Local Retailing Capacity" "Outside Salesman" (June 1949) (hereinafter the "Weiss Report"); DOL, Report and Recommendations on Proposed Revisions of Regulations, Part 541 Defining the Terms "Executive" "Administrative" "Professional" "Local Retailing Capacity" "Outside Salesman" (March 1958) (hereinafter the "Kantor Report") (excerpts from these reports appear in the JA at 20-42); 19 C.F.R. § 1321 (1954). Extensive

testimony was taken at each set of hearings, including testimony concerning the salary test.[6] The reports of all three Presiding Officers discuss the salary test and affirm that test as an element of the definition of the exempt categories of employees.

Beginning in 1985, after the FLSA was extended to protect public employees, the DOL again solicited comments on the exemptions. *See* 50 Fed. Reg. 47696 (1985). In 1991, the Department published a notice of proposed rulemaking revising the application of the salary basis test in the public sector. *See* 56 Fed. Reg. 45828 (1991). The Department received 398 comments on the proposal. 57 Fed. Reg. 37670 (1992). After due consideration, the DOL reaffirmed the application of the salary test in the public sector, but relieved some public employers of the obligation to comply with one element of the test. Public employers that have "pay systems established by statute, ordinance, or regulation, or by a policy or practice established pursuant to principles of public accountability" which require that employees' accumulated leave be docked for absences of less than one day or that employees' pay be docked if they lack sufficient leave, are not, as a consequence, precluded from treating their employees as exempt. 29 U.S.C. § 541.5d.

At the same time, however, the DOL emphasized that "[a]ll other aspects of the salary test were left unchanged for the public sector." 57 Fed. Reg. 37671 (1992). The DOL explained, "Sufficient justification has not been shown in the comments to warrant eliminating altogether the 'salary basis' requirement or making it inapplicable to public sector employees paid above some minimum 'upset' salary level." 57 Fed. Reg. 37671 (1992). One element of the definition of payment on a salary basis that the DOL expressly left in effect in the public sector is the

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[6] In 1940, 165 witnesses testified; 295 in 1949; and an unreported number of "[r]epresentatives of industry and labor organizations and other interested persons" in 1958. *See* Stein Report at 2 n.4; Weiss Report at 97-100; Kantor Report at 2.

requirement that salaried employees not be subject to suspension for less than a week for reasons other then violations of safety rules of major significance. *See* 29 C.F.R. § 541.118(a)(5).[6]

In sum, on five occasions over the course of over 50 years, after the most thorough deliberation, the DOL has affirmed the application of the salary basis test, including the disciplinary suspension element of the test, to determine if employees in both the private and public sectors should be excluded from the protections of the FLSA.

Not surprisingly, then, the salary basis test is well suited to its statutory function of differentiating exempt from nonexempt workers. This is true for three distinct reasons.

1. The other basic test for "executive, administrative, or professional" employees—the duties test—is, in many instances, a complex one to apply to the myriad of factual situations presented by the real world of work. The DOL has found, however, that there is almost a one-to-one correspondence between the employees who are determined, after complex fact finding, to be performing executive, professional or administrative duties and employees who are paid on a salary basis. To put this another way, only in the rarest case is a duties test exempt employee paid on a non-salary basis. After the second set of hearings concerning the exemption regulations, the Presiding Officer explained, "The evidence at the hearing showed clearly that bona fide executive, administrative, and professional employees are almost universally paid on a salary or fee basis. . . . [A]n hourly rate . . . may therefore be rejected as inconsistent with true executive, administrative or professional status." Weiss Report at 24, JA at 36-37.

[6] The DOL considered and rejected comments critical of this element of the salary basis test on the ground that

> the comments failed to demonstrate that public employers are significantly more restricted in the availability of options with respect to employee discipline than private employers. Although public employee terminations may require compliance with procedures designed to protect employee rights, termination for disciplinary reasons is not generally unavailable. In addition, other remedies for disciplinary infractions, such as official reprimands, demotions, and reassignments or restriction of duties, are generally available and used in the public sector.

57 Fed.Reg. 37674 (1992), PA 210a.

By the same token, the DOL has found that employees who perform the duties of administrative, professional and executive employees are rarely subject to disciplinary suspension. The Presiding Officer at the 1949 hearings considered "[t]he practice of disciplining bona fide executive, administrative, and professional employees by making deductions from their salaries," and found that "[s]uch deductions are rarely made today. The disciplining of such employees in the rare instances where it is needed is usually accomplished in other ways than by deductions from salary." Weiss Report at 25, JA at 39.

Since salary status is thus a proxy for performing executive, professional or administrative duties and since the salary test is simple and straightforward in application, it functions as a valuable screen to sort out nonexempt employees without requiring application of the duties test. The salary test makes it easier for employers to classify their employees and for employees to understand their rights. The salary test also makes enforcement of the Act less burdensome. After the 1949 hearings, the DOL's Presiding Officer clearly set forth the value of the salary test as a screening device:

> The experience of the Divisions since 1940 supports the soundness of the inclusion of the salary criteria in the regulations. The testimony at the hearing of many witnesses representing both employers and employees supported the experience of the Divisions with respect to the usefulness and propriety of a salary test for exemption. In this long experience, the salary tests . . . have amply proved their effectiveness in preventing the misclassification by employers of obviously nonexempt employees, thus tending to re-

> duce litigation. They have simplified enforcement by providing a ready method of screening out the obviously nonexempt employees, making an analysis of duties in such cases unnecessary. The salary requirements also have furnished a practical guide to the inspector as well as to employers and employees in borderline cases. In an overwhelming majority of cases, it has been found by careful inspection that personnel who did not meet the salary requirements would also not qualify under other sections of the regulations. . . . In the years of experience in administering the regulations, the Divisions have found no satisfactory substitute for the salary test.

Weiss Report at 8. The final of the DOL reports on the exemptions issued in 1958 similarly found:

> Essentially, the salary tests are guides to assist in distinguishing bona fide executive, administrative, and professional employees from those who were not intended by the Congress to come within these categories. They furnish a practical guide to the investigator as well as to employers and employees . . . and simplify enforcement by providing a ready method of screening out the obviously nonexempt employees. Employees who do not meet the salary test are generally also found not to meet the other requirements of the regulations.

Kantor Report at 3, JA at 42.

The salary test creates a bright line between exempt and nonexempt employees. Its outcome rests on a set of objective facts. The investigator need only ask whether an employee is paid more than the minimum and whether the employee's pay is subject to reduction for impermissible reasons. In contrast, the outcome of the duties test rests on a review of all the tasks actually performed by the employee and the percentage of time spent on each task. *See, e.g.*, 29 C.F.R. § 541.2 (defining duties of administrative employees). Predicting the outcome of the duties test and litigating under the duties test are both

significantly more difficult than application of the salary test. Thus the salary test is of substantial benefit to employers, employees, litigants, the DOL, and the courts. As the Presiding Officer concluded after the 1949 hearings, "Application of the regulations without a salary test would prove difficult for both management and labor and would increase enormously the difficulties of administration." Weiss Report at 9.

2. This correspondence between salaried status and exempt duties is not a mere happenstance. Rather, the definitions of the duties of all three categories of exempt employees include the consistent exercise of discretion. 29 C.F.R. § 541.1(d), .2(b), 3(b). Employees who exercise discretion in their work ordinarily also have discretion concerning when they do their work and the number of hours they need to perform the work. Exempt employees manage themselves and others, they are not the managed.

The independent logic of the salary test becomes apparent if one asks why professional, executive and administrative employees are excluded from the protections of the FLSA. Congress did not exclude these categories of employees simply because they tend to be relatively highly paid. This could easily have been done by basing exemption on pay rates. Nor did Congress exclude all nonmanual workers. This could also readily have been done directly.[7] Instead of excluding highly paid employees or all nonmanual workers, Congress exempted three distinct categories of employees. What do these three types of employees have in common? The answer is they generally control their own work time. They are compensated

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[7] In his 1940 Report, the DOL's Presiding Officer persuasively rejected the argument that Congress intended to exempt all "white collar workers." Stein Report at 6-7, JA 29. "Under the contrary opinion the specific statutory exemptions for named groups . . . would not be needed. . . . Surely if Congress had meant to exempt all white collar workers, it would have adopted far more general terms than those actually found in section 13(a)(1) of the Act." *Id.*

not for the number of hours they work but based on the "general value of the services performed." *Abshire v. County of Kern*, 908 F.2d 483, 486 (9th Cir. 1990), *cert. denied*, 498 U.S. 1068 (1991). As the District of Columbia Circuit observed, "payment on a salary basis is thought to identify executive, administrative, and professional personnel precisely because it indicates employees who are given discretion in managing their time and their activities." *Kinney v. District of Columbia*, 994 F.2d 6, 11 (D.C.Cir. 1993). See also *Balkowan v. Department of Transportation*, 84 F.3d 656, 662 (3rd Cir.), *reh'g granted, vacated on other grounds*, 3 W.HCases 2d (BNA) 672 (3rd Cir. 1996). As the DOL explained just four years after it adopted the salary test, "it is well recognized that bona fide executive, administrative, and professional employees are normally allowed some latitude with regard to the time spent at work." DOL, Wage and Hour Release No. A-9 (Aug. 24, 1944), reprinted in *Wage and Hour Manual (BNA)* 719 (Cum.Ed. 1944-45).

Being paid on a salary basis is thus more than simply a proxy for performing administrative, professional, or executive duties. It is the essence of why these three categories of employees are excluded from coverage. It makes sense to exclude employees who are paid on a salary basis from the overtime provisions of the Act because they control their own time and are, therefore, not subject to the harms Congress aimed to remedy by discouraging long hours.

The disciplinary suspensions at issue here clearly mark employees who do not control their own work time. If employees may be suspended without pay for one or two days, it is clear that they are compensated for the number of hours they work and not for the "general value of the service performed." As the Seventh Circuit recognized, "If an employer measures out discipline in the form of fractions of a weekly salary, the implication is that the employee is really being paid on an hourly basis." *Mueller v. Reich*, 54 F.3d 438, 443 (7th Cir. 1995).

A comparison of young accountants and skilled steelworkers is illustrative. Accountants may work over 40 hours per week, but they choose when to come to work and can take a break during the afternoon to attend to personal business. Steelworkers may work no more hours in the week and may even be paid more than the young accountants, but because steelworkers do not control their own time (they cannot come and go as they choose), their long hours are more oppressive and were the target of the FLSA's overtime provisions. The salary basis element of the salary test is thus a sensible means of determining whether employees are excluded from the protection of the Act's overtime provision.

3. Finally, the salary test serves to determine whether employees are in a sufficiently strong position to be able to protect their interests in the absence of statutory protection. According to the Presiding Officer at the 1940 hearings, the terms used to define the exemptions "impl[y] a certain prestige, status and importance." Stein Report at 19. Because employees who qualify for exemptions are denied the protections of the Act, "[i]t must be assumed that they enjoy compensatory privileges and this assumption will clearly fail if they are not paid a [substantial] salary." *Id.* "[T]he salary test" he concluded, is "of major importance in retaining the benefits of the act for a group of employees . . . who frequently have enjoyed no compensatory advantages." *Id.*, at 42. One of those "compensatory advantages" or "privileges" is freedom from disciplinary suspensions for all reasons except violation of safety rules of major significance.

The salary basis test thus not only serves to distinguish between employees who perform the duties of administrative, professional or executive employees and those who do not, but also between those who need the protections of the overtime provisions and those who do not.

Since the DOL promulgated the salary test in 1940, Congress has extended the coverage of the Act numerous times, including into the public sector in 1966, 1974, and 1985. *See Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 533 (1985); Pub.L. 99-150, 99 Stat. 787 (Nov. 11, 1985).[8] When an agency has a "longstanding interpretation" of a statute and Congress extends or reenacts the statute "without pertinent change," Congress' failure to revise or repeal the agency's interpretation is "persuasive evidence that the interpretation is the one intended by Congress." *NLRB v. Aerospace Co., Div. of Textron*, 416 U.S. 267, 275 (1974). Indeed, in this instance, Congress has twice revised the salary test in minor respects since the FLSA was extended to the public sector. *See* Pub.L.No. 101-583, § 2, 104 Stat. 2871 (Nov. 15, 1990) (amending test as applied to computer programmers); Pub.L.No. 103-3, § 102(c), 107 Stat. 6 (Feb. 5, 1993) (amending test as it relates to leave taken under the Family and Medical Leave Act). And,

> Where an agency's statutory construction has been "fully brought to the attention of the public and the Congress," and the latter has not sought to alter that interpretation although it has amended the statute in other respects, then presumably the legislative intent has been correctly discerned.

North Haven Bd. of Ed. v. Bell, 456 U.S. 512, 535 (1982).

[8] The "particular needs and circumstances" of public employers were "carefully weighed and fairly accommodated" in the 1985 amendments to the Act. House Rep. No. 331, 99th Cong., 1st Sess. 17 (1985). The amendments tailored the law to the public sector, but did not in any way alter the definitions of the exemptions in the public sector. *See* Public Law 99-150, 99 Stat. 787 (1985). Public employers, like the respondent, were accommodated by allowing them (1) to require that law enforcement personnel work up to 171 hours over a period of 28 days without being obligated to pay premium overtime compensation, *see* 29 U.S.C. § 207(k); 29 C.F.R. § 553.201; and (2) to substitute compensatory time off for cash overtime compensation of their employees, *see* 29 U.S.C. § 207(o).

The salary basis test thus rests on the strongest statutory footing.

III. THE EMPLOYER DID NOT CARRY ITS BURDEN OF PROVING PLAINTIFFS WERE PAID ON A SALARY BASIS.

On the undisputed facts, as a matter of law, the plaintiff-employees here were not paid on a salary basis—and that is true whether the governing DOL regulation is, in accord with the dominant view, read literally or whether it is read under the gloss suggested by the United States in its brief in opposition in this case.[9]

In evaluating whether the employer carried its burden of proof, this Court can be guided by its own clear jurisprudence affirming the weight of that burden. When Congress enacted the Fair Labor Standards Act in 1938, it intended to create "minimum standards of living necessary for health, efficiency, and general well-being of workers." 29 U.S.C. § 202(a). In a competitive economy, such minimum standards can only be effectively enforced if they are not subject to broad exceptions that create constant pressure on employers to evade the minimum standards. That is why this Court recognized that "breadth of coverage" is "vital to [the Act's] mission." *Powell v. United States Cartridge Co.*, 339 U.S. 497, 516 (1950). The Act's "scope was stated in terms of substantial universality." *Id.* "[W]ithin the tests of coverage fashioned by Congress, the Act has been construed lib-

[9] While not in dispute, some of the relevant facts must be found in the record, because the district court made no findings with regard to the disciplinary suspension issue. That court discussed the salary basis test only in its denial of plaintiff's motion for summary judgment. PA 71a-73a. But the trial court did not discuss the disciplinary suspension element of the test. Moreover, at the time the motion for summary judgment was denied, there were only 15 plaintiffs. Before trial, an additional 274 plaintiffs opted into the action pursuant to 29 U.S.C. § 216(b). After trial, the district court entered judgment in favor of the employer, but wholly failed to discuss the salary basis test in its opinion. PA 36a-68a.

erally to apply to the furthest reaches consistent with congressional direction." *Mitchell v. Lublin, McGaughy & Ass.*, 358 U.S. 207, 211 (1959). Correspondingly, this Court has repeatedly held that the statutory exemptions in the FLSA should be "narrowly construed." *Michael v. Kentucky Finance Co.*, 359 U.S. 290, 295 (1959). Employers bear a heavy burden of proving that employees fall "plainly and unmistakably within the [exemptions'] terms and spirit." *Corning Glass Works v. Brennan*, 417 U.S. 188, 196-97 (1974).

The employer failed to carry its burden of proving that it satisfied all elements of the salary basis test because the plaintiffs were "subject to" disciplinary suspensions not consistent with 29 C.F.R. § 541.118(a)(5).

A. The Employer's Express Policy Rendered Plaintiffs "Subject to" Disciplinary Suspension.

The employer's express policy clearly stated that plaintiff-employees were "subject to" suspension without pay for short periods for a variety of offenses not limited to violations of safety rules of major significance. PA 107a-113a, 143a-149a. And, the plain language of the governing DOL salary basis regulation makes clear that employees are *not* paid on a salary basis if their weekly salaries are "subject to reduction because of variations in the quality or quantity of the work performed." 29 C.F.R. § 118(a).

As the Seventh Circuit has recognized, " '[s]ubject to reduction' does not mean that a reduction was actually made. The plain meaning of the language suggests that it is enough that a reduction could have been made for an impermissible reason." *Klein v. Rush-Presbyterian-St. Luke's Medical Center*, 990 F.2d 279, 286 (7th Cir. 1993). This is the construction of a majority of the courts of appeals that have addressed the issue. *See Yourman v. Dinkins*, 84 F.3d 655 (2nd Cir. 1996); *Balgowan*, 84 F.3d at 662; *Carpenters v. Denver*, 82 F.3d 353, 359

(10th Cir. 1996); *Bankston v. Illinois*, 60 F.3d 1249, 1253 (7th Cir. 1995); *Hurley v. Oregon*, 27 F.3d 392, 395 n.7 (9th Cir. 1994); *Michigan Ass'n of Gov't Employees v. Department of Corrections*, 992 F.2d 82, 86 (6th Cir. 1993); *Klein*, 990 F.2d at 286; *Martin v. Malcolm Pirnie, Inc.*, 949 F.2d 611, 615, 617 (2nd Cir. 1991), *cert. denied*, 506 U.S. 905 (1992); *Abshire v. County of Kern*, 908 F.2d at 487.

In this instance, the literal reading of the regulation is also the most rational reading for three reasons. First, if, as in this case, the employer has made clear that employees are subject to short suspensions for misconduct other than violation of safety rules of major significance, then the employer has classified the employees in a manner that is inconsistent with the status of administrative, professional and executive employees. That is true whether or not deductions have actually been made. For such deductions will actually occur only if there is misconduct by the employee. Whether an employee or his or her coworker has engaged in misconduct surely is not relevant to the questions of whether they should be covered by the FLSA. The Third Circuit aptly observed that "it would be rather arbitrary to hold that whether an employer qualifies for . . . exemption shall be determined by the employees' collective good behavior." *Balgowan*, 84 F.3d at 663. As the Eleventh Circuit has added, "Such an interpretation of the regulations would lead to an irrational result, because it would favor employees who are disciplined for breaking the rules—and thus become eligible for overtime—over employees who respect those same rules." *Avery v. Talladega*, 24 F.3d 1337, 1342 (11th Cir. 1994). It is the act of classification that speaks to the status of the employees, not the use of the sanctions that the classification permits.[10]

[10] The D.C. Circuit recognized this point when it stated, "The regulation is intended, after all, to divide employees into classes based on their status, not to identify employees deserving compensation for individual losses." *Kinney*, 994 F.2d at 11.

Second, it is important to recognize that the "subject to" language prefaces the entire section defining what it means to be paid on a salary basis not just the disciplinary docking subsection. Employees must receive a predetermined amount that is not "subject to reduction because of variations in the . . . quantity of work performed." 29 C.F.R. § 541.118(a). While the DOL has created a limited exception to the salary basis test for public employers who dock employees pay for short absences because they are required to do so by principles of public accountability, 29 CF.R. § 541.5d, the entire salary basis test still applies in the private sector. Because the "subject to" language appears in the statement of the rule in subsection (a), it cannot be construed to mean one thing with respect to deductions for short absences and another thing with respect to disciplinary suspensions.

Employees do not control their own time, and thus should be protected by the Act's overtime provisions, if they are subject to being docked for short absences whether or not they are ever actually docked. If employees are subject to being docked for short absences, they will not leave work to take a child to the doctor or to attend to other personal business.[11] They cannot come and go as they choose and thus are likely to find long hours more oppressive than employees who are not subject to being docked for short absences. Thus, employees who are subject to being docked, not merely those who are actually docked, need the protection of the FLSA's overtime provisions.

Finally, there is no coherent alternative to a rule that renders employees nonexempt if they are subject to reduc-

[11] The Sixth Circuit, recognized this in *Michigan Ass'n of Gov. Emp.*, "Employees subject to reduction in pay will, of course, attempt to avoid those reductions by juggling schedules and sacrificing non-work opportunities. Simply because a reduction in pay has never been applied does not mean that the employee has not been affected by the policy subjecting the employee to pay reductions." 992 F.2d at 86.

tions in their salary. Neither the statute nor the regulation gives this Court any guidance concerning what amount of actual reduction would render an employee "subject to reduction" and thus nonexempt. A host of questions would be raised by the rejection of the literal terms of the regulation: would an employee gain the protection of the FLSA only for those weeks in which he or she was actually docked; would other employees occupying the same classification also gain protection even if they were not actually docked? There is no coherent answer to these questions because it does not make sense to require actual docking as a prerequisite to extending the protection of the Act.

While several lower courts, including the lower courts in this case, have held that employers can avail themselves of the exemptions even if their employees' salaries are subject to docking, so long as there has been no actual docking, none of these courts has even proposed a standard that can be used to determine what degree of docking will deprive employers of the exemptions, for what time periods, and as to which employees. *See* PA at 9a-10a; *McDonnell v. Omaha*, 999 F.2d 293, 297 (8th Cir. 1993), *cert. denied*, 510 U.S. 1163 (1994); *Atlanta Professional Firefighters Union v. Atlanta*, 920 F.2d 800, 805 (11th Cir. 1991).

The express policy rendering plaintiffs "subject to" disciplinary suspension prevented the employer from carrying its burden of proving plaintiffs were paid on a salary basis.[12]

[12] The prevailing construction of the salary basis regulation supported here imposes little burden on employers. If employers rarely, if ever, resort to docking the pay of otherwise exempt employees, they can readily amend their personnel policies to square them with their practices. An array of disciplinary measures can be substituted for short suspensions. Employers that wish to avail themselves of the exemptions will neither be denied the means of disciplining employees nor prevented from engaging in progressive discipline as a result.

B. The Plaintiffs Were "Subject to" Disciplinary Suspension "as a Practical Matter."

The United States in its brief *amicus curiae* on the *certiorari* petition, proposes a novel construction of the salary basis regulation pursuant to which "salary status is lost . . . only when employees are 'subject to' such a disciplinary suspension *as a practical matter*." U.S. Br. at 10. The government explains, "the employer has the burden of proving that the employees are paid on a salary basis, *e.g.*, by showing that there have been only isolated instances in which disciplinary suspensions have occurred, or that suspensions have occurred only in unusual circumstances." *Id.* Because the employer in this case did not carry even this burden, this Court need not and should not choose between the literal construtions of the regulation and the government's proposed construction. Such a choice is not only unnecessary to decide this case, but premature before the DOL adopts the proposed construction through appropriate administrative procedures.[13]

The employer in this case failed to prove that plaintiffs were not subject to disciplinary suspension as a practical matter. There is no dispute that the employer had a written policy providing for such suspension. The employer presented no evidence that it has revised its policy to make clear that plaintiff-employees could not be suspended for less than a pay period for reasons other than safety violations of major significance. In fact, while the litigation was pending, the employer revised its policy to make termination the sole penalty for violation of its residency requirement, while leaving plaintiff-employees subject to suspension for less than a pay period for all other types of infractions. JA 87; PA 218a.[14] Equally to

[13] The DOL has recently published a notice of its intention to review the regulation at issue. *See* 61 Fed.Reg. 23238 (1996), JA 43.

[14] This revision was obviously motivated by the inconsistency of merely suspending an employee for an ongoing violation of the residency requirement rather than a desire to insure that employees were paid on a salary basis.

the point, in the face of its clear policy and the limited reason of that policy, the employer presented no witness to testify that it would not in the future suspend plaintiff-employees for less than a pay period of reasons other than violation of safety rules of major significance.

The employer, with full access to the personnel files of all its employees, presented no witness to testify that it had not suspended any plaintiff for less than a pay period for reasons other than violation of safety rules of major significance. In fact, the employer's Chief of Police, who was designated by the employer pursuant to Fed. R. Civ. P. 30(b)(6) to testify about its personnel policies, testified that a sergeant "could be—he could be suspended . . ., say, maybe one day suspension, two day suspension." JA 60 (testimony of Chief of Police Robert Scheetz). *See also* JA 53. Several other management and supervisory witnesses testified that plaintiffs could be suspended for less than a pay period for reasons other than violation of safety rules of major significance. *See* JA 53 (testimony of Rosalie Corelyou, defendant's 30(b)(6) designee on compensation administration, that "they may say your punishment is two days plus the day you were not here"); 63 (testimony of Larry Pattison, defendant's 30(b)(6) designee on FLSA exemptions, that "the discipline could include suspension for a particular number of days, which would be loss of pay for that day"); 76 (testimony of Lt. James Scago that "[s]ure, but it could be longer than a day or two or it could be less"). Several plaintiffs testified that they could be suspended for less than a pay period for reasons other than violation of safety rules of major significance. *See, e.g.*, JA 85, 86; PA 217a.

One of the 16 plaintiffs who testified was suspended for less than a pay period for violation of the residency requirement. JA 87; PA 217a.[15] While the suspension re-

[15] Because the case was bifurcated and the liability phase involved the testimony of only 16 representative plaintiffs, jointly chosen

sulted from the reduction of an initial proposal to remove the plaintiff, this is not an unusual circumstance, but rather a common occurrence resulting from both formal grievance procedures and informal protests and compromises between employers and employees. In addition, another plaintiff testified that he knew of other sergeants who had been suspended. JA 86.

Even courts, such as the Eleventh Circuit, that have held that actual deductions are necessary to deprive an employer of the benefit of the exemptions, hold that the suspension of one employee prevents the employer from claiming the exemptions for all employees in the same classification. *See Avery*, 24 F.3d at 1342. The DOL has endorsed this conclusion.[16]

Finally, there is other evidence in the record suggesting that plaintiffs were not paid on a salary basis. Plaintiffs' time and attendance records were kept on an hourly basis and they were subject to strict reporting and attendance requirements. JA 60, 65.[17] Some plaintiffs earned additional cash compensation or compensatory time off for extra hours worked and some received a shift differential on an hourly basis. JA 48, 73, 76, 79, 81, 82, 15-17, 47, 51.[18]

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by the parties, their supervisors, and Fed.R.Civ.P. 30(b)(6) designees, the testimony of the 16 plaintiffs should be understood to be representative of the experience of all 289 plaintiffs.

[16] In 1992, the DOL was asked to "[c]larify that all improper deductions result in loss of the exemption only for the particular employee docked and only in the workweek of the improper deductions," 57 Fed. Reg. 37666 (1992), PA 211a. The DOL classified the "suggested change" as "a significant departure from long-standing policy that is not substantiated by comment." *Id.*

[17] Several lower courts have held that rigid, hourly attendance requirements are inconsistent with salaried status. *See, e.g., Abshire*, 908 F.2d at 486 (exempt employees "are thought not to punch a time clock").

[18] Several lower courts have held that additional compensation for extra hours worked is inconsistent with salaried status. *See*

Under any plausible construction of the salary basis test, the employer did not carry its burden of proof in this case.

IV. THE EMPLOYER CANNOT GO THROUGH THE WINDOW OF CORRECTION.

There is a narrow "window of correction" available to employers who have inadvertently and in isolated instances acted inconsistently with the salary basis test. 29 C.F.R. § 118(a)(6) provides that "where a deduction not permitted by these interpretations is inadvertent, or is made for reasons other than lack of work, the exemption will not be considered to have been lost if the employer reimburses the employee for such deductions and promises to comply in the future." [19]

It is obvious that the employer here cannot pass through the window of correction because it has not complied with the express terms of the regulation. The employer has not

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Abshire, 908 F.2d at 486; *Brock v. Claridge Hotel and Casino*, 846 F.2d 180, 184-85 (3d Cir. 1988). 29 C.F.R. § 541.118(b) provides that additional compensation over a minimum salary is not inconsistent with payment on a salary basis, but the examples given in the subsection are commissions on sales, a percentage of sales, and payment for extra days or shifts worked. The subsection thus implies that extra compensation for extra hours worked is inconsistent with payment on a salary basis.

[19] The entire subsection provides:

> The effect of making a deduction which is not permitted under these interpretations will depend upon the facts in the particular case. Where deductions are generally made when there is no work available, it indicates that there was no intention to pay the employee on a salary basis. In such a case the exemption would not be applicable to him during the entire period when such deductions were being made. On the other hand, where a deduction not permitted by these interpretations is inadvertent, or is made for reasons other than lack of work, the exemption will not be considered to have been lost if the employer reimburses the employee for such deductions and promises to comply in the future.

reimbursed even the one employee who was shown to have been docked. Moreover, the employer has not revised its discipline policy to exclude allegedly exempt classifications or in any other way promised not to dock such employees in the future.

Even if the employer were to now reimburse all employees who have been suspended and promise not to suspend allegedly exempt employees in the future, the window of correction should be deemed closed once litigation is initiated. A contrary rule would encourage employers to ignore the salary test, deny overtime compensation to hourly employees, wait to be sued, and then merely reimburse those employees who sue for any reductions they suffered. Such a result would deprive employees who have been treated as hourly employees of the remedies specifically provided for in the Act: recovery of "unpaid overtime compensation . . . and . . . an additional equal amount as liquidated damages." 29 U.S.C. § 216(b).

Finally, the window of correction should not be opened for employers who have made deliberate rather than inadvertent deductions. While the literal terms of the subsection appear to allow employers to utilize the window of correction where deductions are inadvertent *or* made for reasons other than lack of work, the majority of courts of appeal have held that the subsection should be read in the conjunctive rather than the disjunctive. *See Klein*, 990 F.2d at 287; *Martin*, 949 F.2d at 616-17; *Abshire*, 908 F.2d at 489.[20] To allow an employer to expressly and

[20] In this case, the Court of Appeals makes contradictory statements on this issue. On the one hand, the court below states that "[b]ecause the regulation is written in the disjunctive, it is not material that the deduction from Sergeant Guzy's pay was not inadvertent so long as it was made for reasons other than lack of work," PA 9a-10a n.7, but, on the other hand, that court states, that "[t]he 'window of correction' is not available if the employer has a settled policy of making improper deductions from compensation." PA 10a.

deliberately treat employees as hourly employees, to require that those employees work overtime, to deny those employees overtime compensation required by the FLSA and then allow the employer to avoid any obligation to pay overtime compensation if it merely reimburses the employees for any reductions in their salaries, would be to gut the effectiveness of the salary basis test. Such an outcome would undermine the statutory objective of discouraging long hours among hourly employees and deny employees who have been treated as hourly and not paid in accordance with the Act an adequate remedy.

Because the employer in this case has not reimbursed employees for reductions, has not promised to comply in the future, did not correct its practice prior to initiation of litigation, and made reductions pursuant to an express policy, the employer cannot pass through the window of correction.

CONCLUSION

For the above-stated reasons, this Court should reverse the decision below with directions to enter judgment in favor of the plaintiffs.

Respectfully submitted,

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